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No. 93-931589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,

v.

ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

**On Petition for
Writ of Certiorari to the
Supreme Court of Alabama**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Alabama standards for post-verdict review of punitive damage awards, as applied in this products liability case to uphold the imposition of five separate punitive damage awards (ranging from $250,000 to $1,000,000 to $4,000,000 and totaling $6,500,000) against petitioners for a single act, violate the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

In addition to the parties named in the caption, Ruth McCord and Louisiana Waddell also were plaintiffs in the court below and are respondents in this Court. Respondent Annie Harris sued both in her capacity as the administratrix of the estate of her deceased daughter Joyce Simpson and as "next friend and mother of her minor children Felicia D. Simpson and Janice D. Simpson." Pursuant to Rule 29.1 of the Rules of this Court, petitioners disclose that they have the following parent companies and non-wholly owned subsidiaries: State Industries' parent company is State Holding Co.; it has no non-wholly owned subsidiaries. Sears has no parent company; it has two non-wholly owned subsidiaries, Allstate Insurance Co. and Dean Witter, Inc.

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PETITION FOR WRIT OF CERTIORARI

Sears Roebuck and Company ("Sears") and State Industries, Inc. ("State Industries") respectfully petition this Court for a writ of certiorari to review the judgment below of the Supreme Court of Alabama.

OPINIONS AND ORDERS BELOW

The September 10, 1993 opinion of the Supreme Court of Alabama affirming the judgment of the trial court is unreported and reproduced as Appendix ("App.") A, 1a-37a. That court's January 7, 1994 order overruling

petitioners' application for rehearing and modifying the court's September 10 opinion is unreported and reproduced in App. D, *infra*, 65a. The court's opinion, as modified, is unreported and reproduced in App. E, *infra*, 66a-102a. The trial court's May 13, 1992 order denying petitioners' Motion for a New Trial and for Judgment Notwithstanding the Verdict is unreported and reproduced in App. C, *infra*, 47a-64a.

JURISDICTION

Petitioners raised their federal constitutional objections to punitive damages at every stage of the proceedings in the Alabama courts. *See infra* pages 7-10. The Supreme Court of Alabama denied petitioners' Application for Rehearing on January 7, 1994. This petition is being filed within ninety days of the denial of rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Statement of the Facts

This products liability action involves the imposition of five separate punitive damage awards, ranging from $250,000 to $1,000,000 to $4,000,000 and totaling $6,500,000, against petitioners for a single act—the alleged "wanton" failure to provide adequate warnings concerning the proper installation in 1989 of a gas water heater that State Industries had manufactured for Sears in 1981.

"The water heater came with a 15-page instruction manual . . . . In the manual were instructions telling users how to install the water heater properly." App. E, *infra*, 68a. The manual explicitly told users to "vent[] the water heater by means of a pipe extending from the draft hood of the water heater to the outdoors." *Id.*

The water heater was "originally purchased from Sears in 1984 by Sam Ferlisi." *Id.* 69a. Mr. Ferlisi properly installed the water heater pursuant to the accompanying detailed instruction manual. *Id.* Shortly thereafter, he discontinued use of and dismantled the heater and stored it in his garage. *Id.*

Approximately five years later, in 1989, Mr. Ferlisi gave the water heater to respondent Ruth McCord. *Id.* However, by that time the "instruction manual was missing," as were several integral components of the water heater, including the draft hood and vent pipe, which were necessary for proper installation. *Id.*

Mrs. McCord's grandson, Dexter McCord, installed the water heater in her mobile home in November 1989. *Id.* There is no dispute that the eight-year-old water heater "was improperly installed." *Id.* 70a. Indeed, Mr. McCord "installed the water heater without a pipe to vent carbon monoxide and other exhaust gases outside the mobile home. At trial, [he] testified that when he installed the water heater he did not know that the gas water heaters required venting." *Id.* 69a-70a.

On December 18, 1989, the overnight occupants of Mrs. McCord's mobile home—Joyce, Janice and Felicia Simpson and Louisiana Waddell, but not Mrs. McCord—suffered carbon monoxide poisoning. *Id.* 70a. Joyce Simpson died as a result; the other occupants suffered "minor" and "relatively slight" injuries. *Id.* 94a.

On July 30, 1990, respondents brought this products liability action against Dexter McCord and Sears. Prior to

trial respondents dismissed their claims against Mr. McCord and amended their complaint to add State Industries as a defendant.

On February 28, 1992, the trial court entered judgment on the jury's verdict against Sears and State Industries, which assessed joint and several liability against them for the following damages:

Annie Harris, as administratrix	$4,000,000 (Wrongful Death)[1]
Felicia Simpson	$2,000,000 (Compensatory) $1,000,000 (Punitive)
Janice Simpson	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Louisiana Waddell	$2,000,000 (Compensatory) $1,000,000 (Punitive)
Ruth McCord	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Total	$12,000,000

Id. 72a-73a.

B. The Decision Below

On September 10, 1993, the Supreme Court of Alabama issued its initial decision in this case. *See* App. A, *infra*. The court repeatedly recognized that the water heater had been improperly installed. *See, e.g., id.* 5a, 17a. It also acknowledged that petitioners had included substantively adequate warnings in the instruction manual that had accompanied the water heater when it was manufactured in 1981 and sold to Mr. Ferlisi in 1984. *See id.* 3a.

The court nonetheless held that petitioners had been "wanton" because they had not attached the instructions

[1] In Alabama, "wrongful death" damages are considered to be exclusively punitive in nature. *See* App. A, *infra*, 34a.

permanently on the water heater and also had failed to anticipate that the water heater would be misused and incorrectly installed contrary to the written instructions. Moreover, while there was conflicting evidence in the record that the water heater was the source of the carbon monoxide, *see id.* 10a-12a, the court upheld the jury's finding in that regard, relying in substantial part on a state inspector's report (the "Gilliland report") that had *never* been introduced into evidence. *See id.* at 11a.

The court below also rejected petitioners' arguments that the multiple, varying punishments for the same act were fundamentally inconsistent, arbitrary, duplicative and irrational and therefore violated the Due Process Clause of the Fourteenth Amendment. Even though petitioners had raised their federal due process challenges at every stage of the proceedings—pretrial and post-trial and on appeal (*see infra* at pages 7-10)—the court held that petitioners had "waived" their due process claims and refused to address them. *See id.* 27a.

The court ordered a remittitur of the compensatory damage awards, holding that "the plaintiffs' special damages . . . are minor and their long-term symptoms or permanent injuries relatively slight." *Id.* 28a-29a. The court reduced from $750,000 to $1 the compensatory damages awarded to Ruth McCord, who "was not present on the evening that [the other respondents] were poisoned . . . and . . . did not appear and testify at trial." *Id.* 29a. The court declared that Mrs. McCord did not suffer "any legally compensable injury." *Id.*

The court also reduced Janice Simpson's compensatory damage award from $750,000 to $100,000; Felicia Simpson's compensatory award from $2,000,000 to $250,000; and Louisiana Waddell's compensatory award from $2,000,000 to $500,000.

However, the court found that the "punitive damage awards were not excessive." *Id.* 31a. The court left the

aggregate $6,500,000 punishment standing even though Alabama law purports to require post-verdict scrutiny of the relationship between punitive damages and compensatory damages[2] and the court had significantly reduced the compensatory damages in this case. The court affirmed the $250,000 punitive damage award to Ruth McCord despite its finding that she had suffered *no* injury. And it did not even attempt to reconcile or justify the radically differing amounts of the multiple punishments in light of the fact that the awards all were imposed to penalize the "same act." *Id.* 33a (Houston, J., concurring and dissenting).

Justice Houston found the four non-wrongful death punitive damage awards "inconsistent" and improper, noting that the two $1,000,000 punitive awards "exceeded society's goal of punishment and deterrence by $750,000 each, for the same jury set society's goal of punishment and deterrence for the same act or omission . . . at $250,000" as to two other plaintiffs. *Id.* 36a-37a.

Petitioners filed an application for rehearing in which they argued, *inter alia*, that the Alabama Supreme Court's application of its post-verdict review standards in this case violated the Due Process Clause, departed significantly from the Alabama post-verdict process as understood and approved by this Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and produced five arbitrary, wildly disparate and capricious punishments for the same alleged act in the same case. *See* App. B, *infra*, 41a-46a. Petitioners also pointed out that they had raised their federal due process claims throughout the trial and appellate proceedings, in accordance with governing Alabama standards. *Id.* 39a-41a. And petitioners argued that the Gilliland report could not be used to justify the jury's verdict since it had not been put before the jury.

On January 7, 1994, the Alabama Supreme Court denied rehearing, *see* App. D, *infra*, but modified its opinion

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[2] *See Green Oil Co.* v. *Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989).

by deleting its previous direct reliance on the Gilliland report. The court affirmed and reiterated its prior holdings in all other material respects. *See* App. E, *infra*.

On January 20, 1994, the court below denied petitioners' request for a stay pending the proceedings in this Court. On February 10, 1994, Justice Kennedy granted petitioners' Application for a Stay. App. F, *infra*, 103a.

C. Presentation of the Federal Question

Notwithstanding the Alabama Supreme Court's assertion of waiver, the record plainly reveals that petitioners properly preserved the federal question raised in this petition at every stage of the proceedings below.

For example, in its Answer, petitioner Sears explicitly raised a host of broad-based federal due process claims, including (1) "[a]ny award of punitive damages would deprive the defendant of property without due process of law"; (2) "there is a lack of sufficient standards and safeguards governing punitive damage awards in Alabama"; (3) the imposition of punitive damages would violate due process because Alabama "grants wholly standardless discretion to determine the severity of the punishment"; and (4) the Alabama "standards for awarding punitive damages are vague and nebulous and are not rationally related to a legitimate government interest." *See* App. G, *infra*, 104a-106a.[3]

Petitioners reiterated and expanded on their federal due process arguments in their post-trial motions. *See* App. I, *infra*. They contended, *inter alia*, that punitive damage awards violated the Due Process Clause because (1) "[t]here are no specific standards" or limits governing the amount

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[3] In their pre-trial position statement, petitioners reiterated their contention that "the plaintiffs' claims for punitive damages are violative of the Constitution[ ] of the United States of America." *See* App. H, *infra*, 107a.

of punitive damages that could be imposed; (2) "[t]here are no provisions for clear and consistent appellate standards of review of any award of punitive damages" in Alabama; (3) Alabama "procedures . . . fail to provide a meaningful opportunity for challenging the excessiveness of such awards"; and (4) Alabama "procedures permit and encourage varying degrees of punishment for a single wrongful act and are inherently and fundamentally flawed in permitting and encouraging inconsistent verdicts." *Id.* 108a-111a.

In its May 13, 1992 order denying the post-trial motions, the trial court expressly rejected these arguments on the merits. *See* App. C, *infra*, 62a. It observed that "[t]hese constitutional argument[s] have been articulated before by others . . . , but to no avail" and held that "[o]nce again, the constitutional arguments advanced by the Defendants must be denied." *Id.*

In the Supreme Court of Alabama, petitioners argued that five different punishments of widely varying amounts necessarily did not bear any rational relationship to the conduct involved, in violation of the Due Process Clause. "[T]he defendants were presumably guilty of a single wrongful act, but the . . . jury . . . assessed punishment in varying amounts." App. J, *infra*, 116a. Such inconsistent, successive punishments for a single act imposed in the same case, petitioners asserted, "violate basic principles of fairness and, thus, due process of law." *Id.* at 120a.

As discussed above, petitioners repeated these arguments on rehearing. They also challenged the Alabama Supreme Court's application of its own post-verdict review standards as arbitrary and unconstitutional. *See* App. B, *infra*.

Based upon the foregoing, there can be no doubt that petitioners properly preserved their federal constitutional claims. In fact, petitioners' due process challenge to the Alabama Supreme Court's application of its appellate re-

view standards was indisputably presented at the first possible opportunity—on rehearing—and the federal question was therefore timely and properly raised. *See, e.g.*, *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 86 n.9 (1979) ("federal claims . . . have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law"); *Brinkeroff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930) (federal claim first raised on petition for rehearing in state supreme court was timely "since it was raised at the first opportunity"); *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917) (violation of Fourteenth Amendment for state supreme court to reverse trial court in such a way as to deny litigant an opportunity to present evidence; "it would leave a serious gap in the remedy for infraction of [federal] constitutional rights if the party aggrieved in such a way could not come here").

Moreover, the Supreme Court of Alabama's refusal to consider petitioners' due process claims constitutes a clear and impermissible discrimination against federal claims and therefore cannot protect the judgment below from review by this Court.[4] Indeed, in cases presenting *state* constitutional challenges, the court below has not hesitated to consider claims that were not advanced at all—either in the trial court or on appeal. For example, a few days after this Court's decision in *Haslip*, the Alabama Supreme Court in *Armstrong* v. *Roger's Outdoor Sports*, 581 So. 2d 414 (Ala. 1991), struck down punitive damage provisions of the State's "tort reform" law pursuant to the state constitution's separation of powers clause, despite the fact

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[4] "[A] State may not deny rights protected under the Federal Constitution through pretextual procedural rulings." *Stevens* v. *City of Cannon Beach*, No. 93-496, slip op. at 6 (Mar. 21, 1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of certiorari) (citing *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 455-58 (1958)).

that that theory had not been "raised, . . . as grounds for overturning the statutes." *Id.* at 416.[5]

Thus, while the ultimately successful state-law challenges to a statutory *protection* against excessive punitive damages had *never* been raised *at all* by the plaintiff in *Armstrong*, petitioners here raised their federal due process attacks on Alabama's common-law procedures for punitive damages at every stage of the proceedings, yet the court below refused to decide them. The decision below is precisely the kind of arbitrary discrimination against federal claims that this Court has repeatedly condemned. *See, e.g., Testa* v. *Katt*, 330 U.S. 386, 394 (1947) (where "same type of claim arising under [State] law would be enforced by that State's courts," the "State courts are not free to refuse enforcement of" analogous federal claims). And such "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. at 457.

REASONS FOR GRANTING THE WRIT

Three years ago in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), this Court sustained the constitutionality of the Alabama punitive damage system. Ever since *Haslip*, however, the Alabama punitive damage system has been "run[ning] wild." *Id.* at 18. Alabama juries have been returning 7- and 8-digit punitive damage ver-

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[5] *See also id.* at 423 (Maddox, J., dissenting) (complaining that theory used to strike down tort reform statute "was neither raised nor argued in the trial court or in this Court"); *id.* at 428 (Houston, J., dissenting) (majority's striking down of statute on grounds never argued by plaintiff "is judicial activism at its worse"). At an earlier stage in *Armstrong*, the court also had found that the plaintiff had failed to observe a state jurisdictional prerequisite for raising constitutional arguments on appeal. *See id.* at 414 (Sept. 7, 1990 opinion). Rather than rejecting those arguments on waiver grounds, however, the court remanded the case to the trial court to allow the appellant to cure the defect. *Id.*; *see also id.* at 428 (Houston, J., dissenting).

dicts with remarkable frequency, and the Alabama Supreme Court has done nothing to stop this trend, and everything to aggravate it, even to the point of invalidating legislative attempts to mandate independent judicial review of punitive damage awards and to impose a statutory limit on the size of such awards. This Court should intervene to examine the constitutional validity of Alabama's post-verdict review mechanism as it is being applied in the wake of *Haslip*. Such review by this Court is especially appropriate and necessary because it will provide further guidance to the courts of other jurisdictions that have looked to the Alabama system as the model for their own respective systems. In particular, this case, along with *Honda Motor Co.* v. *Oberg, cert. granted*, 114 S. Ct. 751 (1994) (No. 93-644), provides the opportunity for the Court to articulate clearly the constitutional requirements for post-verdict review of punitive damage awards.

A. Post-*Haslip* Decisions Of Alabama Courts Demonstrate That Alabama's Post-Verdict Review Standards Are Neither Meaningful Nor Adequate.

In *Haslip*, the Court approved the Alabama system based on its understanding that the Alabama Supreme Court "[b]y its review of punitive damage awards . . . makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." 499 U.S. at 20-21. The *Haslip* Court endorsed the Alabama's "*Green Oil*"[6] factors for appellate review, which this Court perceived to include "a comparative analysis" and "detailed substantive standards" to determine whether a punitive damage award was excessive. *Id.* at 21-22.

The Court in *Haslip* concluded that "application of these standards . . . imposes a sufficiently definite and meaningful constraint" on the discretion of Alabama juries, ensur-

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[6] *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-24 (Ala. 1989).

ing that "punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." *Id.* at 22. The Court went out of its way to distinguish the systems of other States that lack such a judicial check on jury discretion. *See id.* at 21 n.10 (contrasting the Alabama system with the Vermont and Mississippi systems, which, respectively, permit appellate courts to reduce or set aside only " 'manifestly and grossly excessive' " punitive damage awards or awards that " 'evince[ ] passion, bias and prejudice on the part of the jury so as to shock the conscience' ").

Thus, the Court's decision in *Haslip* was premised on the theory that Alabama courts engaged in a detailed, objective, quasi *de novo* review of punitive damage verdicts. By endorsing the Alabama system and emphasizing the Court's understanding of the protections provided by the judicial review process, "*Haslip* promised that, even if juries occasionally failed to fulfill their function faithfully, trial and appellate courts would provide meaningful review sufficient to . . . guarantee constitutional results." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting).

In case after case since *Haslip*, however, the Alabama punitive damage system has proven to be wholly inadequate to impose "a sufficiently definite and meaningful constraint" on jury discretion. Juries in Alabama state courts have continued to render immense punitive damage awards at an unabated pace totaling in the hundreds of millions since *Haslip* was decided.[7] Indeed, in Lowndes

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[7] *See, e.g., Wheeler* v. *Lemond Contracting Co.*, No. CV-92-145-S (Chambers County, Ala. Cir. Ct. Nov. 1993) ($3.5 million for wrongful death in premises liability case; post-trial motions pending); *Hoots* v. *Duck Head Apparel Co.*, No. CV-92-561-PR (Montgomery County, Ala. Cir. Ct. Nov. 24, 1993) ($19.5 million to three salesmen allegedly defrauded of sales commissions; post-trial motions pending); *West* v. *Mon-*

County, Alabama alone—where the case at bar was tried—almost $40 million in punitive damages have already been awarded by juries this year, adding to the millions of dollars in punitive damage verdicts already returned by juries in that county since *Haslip*.[8] And in Alabama federal courts

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trose Bay Healthcare Center, No. CV-91-617 (Baldwin County, Ala. Cir. Ct. Nov. 19, 1993) ($65 million for wrongful death resulting from alleged nursing home neglect; settled post-trial); *Fairhope Yacht Club, Inc.* v. *Dyna-Span Corp.*, No. CV-90-111-PB (Baldwin County, Ala. Cir. Ct. Oct. 18, 1993) ($1 million for alleged insurance fraud); *Britton* v. *AAA Plumbing Pottery Corp.*, No. CV-91-4470 (Jefferson County, Ala. Cir. Ct. Oct. 9, 1993) ($2 million for alleged fraud in workers compensation case; settled post-trial); *Gillam* v. *FMC Corp.*, No. CV-90-2723-FDM (Mobile County, Ala. Cir. Ct. May 7, 1993) ($25.3 million remitted by trial judge to $12.5 million for wrongful death in products liability case; appeal pending); *Williamson* v. *American Pioneer Life Ins. Co.*, No. CV-89-9560-W (Jefferson County, Ala. Cir. Ct. Apr. 12, 1993) ($3 million for alleged fraud; appeal pending); *Smith* v. *Schulte*, No. CV-90-1334-DIJ (Mobile County, Ala. Cir. Ct. Apr. 6, 1993) ($4.5 million for wrongful death in medical malpractice case; appeal pending); *Harrington* v. *Independent Life and Accident*, No. CV-91-113 (Marion County, Ala. Cir. Ct. Dec. 12, 1992) ($6.23 million for alleged insurer fraud); *Carter* v. *Bituminous Casualty Corp.*, No. CV-90-222 (Marion County, Ala. Cir. Ct. Dec. 12, 1992) ($2.5 million in commercial insurance case); *Thompson* v. *Turner*, No. CV-91-320 (Russell County, Ala. Cir. Ct. Dec. 3, 1992) ($2 million for alleged fraud); *Little* v. *Fontaine Trucking Co.*, No. CV-90-0107 (Greene County, Ala. Cir. Ct. Nov. 6, 1992) ($25 million for wrongful death in products liability case); *Daily* v. *Mazda*, No. CV-90-574 (Colbert County, Ala. Cir. Ct. Apr. 1992) ($1.6 million for wrongful death in products liability case); *Callaway* v. *Life and Health Ins. Co.*, No. CV-89-0052 (Crenshaw County, Ala. Cir. Ct. Mar. 13, 1992) ($3 million for alleged insurance fraud); *Boykin* v. *Trinity Ins. Co.*, No. CV-90-02 (Barbour County, Ala. Cir. Ct. Sept. 1991) ($6.25 million for insurance fraud; case settled during appeal); *Person* v. *Union Mortgage Co.*, No. CV-90-048 (Barbour County, Ala. Cir. Ct. July 24, 1991) ($45 million to five plaintiffs for alleged lender fraud; settled post-trial); *Allen* v. *Physicians' Weight Loss Centers*, No. CV-89-1969 (Mobile County, Ala. Cir. Ct. June 5, 1991) ($15 million for wrongful death in case involving weight loss program; settled post-trial); *Madden* v. *Magnolia Bay*, No. CV-87-889 (Mobile County, Ala. Cir. Ct. June 5, 1991) ($10 million for wrongful death; appeal pending).

[8] *See, e.g., Davis* v. *Associates Fin. Servs. Co.*, No. CV-93-38 (Lowndes

sitting in diversity, similarly substantial punitive damage awards abound.[9]

Although Alabama courts have occasionally reversed or ordered remittitur of punitive damage awards, the more routine practice has been to leave such awards undisturbed based upon a "presumption of correctness" accorded to jury verdicts, a substantial degree of deference that, since *Haslip*, has been determined to be mandated by the Alabama state constitution. *See, e.g., Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 420 (Ala. 1991); *Mokrzycki* v. *Continental Eagle Corp.*, 611 So. 2d 313, 321 (Ala. 1992) (affirming punitive damage award after observing that "[t]his Court is bound by a presumption of correctness of the amount of punitive damages rendered by the trier of the fact").[10] At the Alabama Supreme Court

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County, Ala. Cir. Ct. Mar. 11, 1994) ($33 million in punitive damages and $1.5 million in compensatory damages assessed against lender for allegedly forging plaintiff's signature on bank loan to plaintiff's ex-husband; post-judgment motions pending); *Foster* v. *Ford Motor Co.*, No. CV-91-34 (Lowndes County, Ala. Cir. Ct. Feb. 24, 1994) ($6 million punitive award and $4,492,000 in compensatory damages, including mental anguish, assessed against Ford for allegedly fraudently promising plaintiffs that their car dealership would stay in business with high rate of return); *see also Union Mortgage Co.* v. *Barlow*, 595 So.2d 1335 (Ala. 1992) (Lowndes County case in which Alabama Supreme Court affirmed $6,001,000 punitive damage award against lender for alleged fraud resulting in $150,000 in compensatory damages).

[9] *See, e.g., Cole* v. *Southern Valley Trust*, CV-90-2573 (N.D. Ala. Mar. 2, 1992) ($25 million in punitive damages for alleged medical insurance agent fraud); *Enstar Group, Inc.* v. *Grassgreen*, 812 F. Supp. 1562 (M.D. Ala. 1993) ($18 million punitive award remitted to $10 million in shareholder suit against former director for alleged breach of duty of loyalty); *Richards* v. *Michelin Tire Corp.*, 786 F. Supp. 964 (S.D. Ala. 1992) ($5 million in punitive damages assessed in products liability case).

[10] *See also Henderson* v. *Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993) (affirming $500,000 punitive damage award against utility for injuries to youth who trespassed on utility property and climbed an electrical transmission tower after getting past a device installed by utility to prevent climbing).

level, this presumption is virtually unrebuttable, given that the State's highest court has determined that the "presumption of correctness" is "strengthened" by the fact that the verdict has been upheld by the trial court. *See Armstrong*, 581 So. 2d at 420.

The substantial deference paid by Alabama courts to punitive damage verdicts renders the *Green Oil* factors virtually meaningless. Often, the amount of punitive damages affirmed on appeal bears little relation to the actual harm (or potential future harm) incurred by the plaintiff.[11] Indeed, the Alabama Supreme Court has determined that there need be no relationship whatsover between the punitive and compensatory awards, based upon the reasoning that "[i]mposing . . . such a relationship would inevitably result in *injustice*, and we decline to impose it." *Southern Life and Health Ins. Co.* v. *Turner*, 586 So. 2d 854, 858 (Ala. 1991) (affirming award of $500,000 in punitive damages for tort causing only $1,000 of compensatory damages) (emphasis added); *see, e.g., Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 887 (Ala. 1992) ($1 million in punitive damages in insurance bad faith action where coverage amount of the policy was $10,000). And, as is demonstrated by the award here of $250,000 in punitive damages to Mrs. McCord, who was permitted only $1 in nominal compensatory damages, the Alabama Supreme Court has made clear that no compensatory damages whatsoever need be awarded to support a substantial punitive damages verdict.[12] The Alabama Supreme Court has even gone so far as to reverse a trial court's order granting a

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[11] *See, e.g., Principal Fin. Group* v. *Thomas*, 585 So. 2d 816 (Ala.) (punitive damages 750 times compensatory damages) *cert. denied*, 112 S. Ct. 649 (1991); *Alfa Mutual Ins. Co.* v. *Veal*, 622 So.2d 1292 (Ala. 1993) (200 times); *Smith* v. *States General Life Ins. Co.*, 592 So. 2d 1021 (Ala. 1992) (416.67 times).

[12] *See also Shoals Ford* v. *McKinney*, 605 So.2d 1197 (Ala. 1992); *Caterpillar* v. *Hightower*, 605 So.2d 1193, 1195 (Ala. 1992); *First Bank of Boaz* v. *Fielder*, 590 So.2d 893, 898 (Ala. 1991).

new trial and reinstate the jury's punitive damage verdict in a case in which there were no compensatory damages to support the award of punitive damages. *See Garner* v. *City of Opp*, 624 So. 2d 1346 (Ala. 1993).

In those rare cases in which the Alabama Supreme Court has reduced a punitive damage award, it has tended literally to "split the difference" with the jury in an arbitrary and capricious manner that reflects no rhyme or reason.[13] And since there is "no discernible standard" for post-verdict review, it is hardly a comfort to know that "whatever number the jury picks out of the air can be reduced by the trial judge or on appeal." *Haslip*, 499 U.S. at 37 (Scalia, J., concurring in the judgment).

Not only has the Alabama Court engaged in highly deferential and ad hoc review of punitive damage awards, but, through its post-*Haslip* rulings, it has completely thwarted legislative efforts to reform the Alabama punitive damage system. Only four days after *Haslip* was decided, the Alabama Supreme Court struck down, on state constitutional grounds not even mentioned by the plaintiff, a statute that would have required that the Alabama courts engage in precisely the kind of independent review that seemed to be contemplated by this Court in *Haslip*. *See Armstrong*, 581 So. 2d at 423 (Maddox, J., dissenting) (*Armstrong* "proves that the Supreme Court of the United States was mistaken when it called [the Alabama post-verdict review procedure] . . . 'meaningful and adequate'" in *Haslip*.).

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[13] *See, e.g., Gore* v. *BMW of North America*, 1993 WL 462033, Nos. 1920324, 1920325 (Ala. Oct. 29, 1993) ($4 million remitted to $2 million); *Big B, Inc* v. *Cottingham*, 1993 WL 341132, No. 1920746 (Ala. Sept. 10, 1993) ($1 million remitted to $600,000); *Northwestern Mutual Ins. Co.* v. *Sheridan*, 630 So. 2d 384 (Ala. 1993) ($25,727,248 remitted to $12,863,624); *General Motors Corp. v. Johnson*, 592 So. 2d 1054 (Ala. 1992) ($15 million remitted to $7.5 million).

More recently, the Alabama Supreme Court declared that the legislative limit of $250,000 on most punitive damage awards violated the state constitutional right to a jury trial. *Henderson* v. *Alabama Power Co.*, 627 So. 2d 878, 893-94 (Ala. 1993). The court made clear that the imposition of punitive damages in Alabama is an utterly ad hoc "exercise [in] *direct* democracy" by the jury and review on "*a case by case basis*" by the courts that cannot be constrained by *any* objective legislative limits. *Id.* at 893 (emphasis in original). Thus, while "views . . . regarding severity of punishment . . . are peculiarly questions of legislative policy," *Gore* v. *United States*, 357 U.S. 386, 393 (1958), the Alabama Supreme Court has affirmatively banned that State's legislature from playing any role in controlling punishment meted out in the form of punitive damages.

In his dissenting opinion in *Henderson*, Justice Maddox expressed the view that "[i]n striking down the cap statute," the Alabama Supreme Court had "remove[d] one of the underpinnings that I believe caused the United States Supreme Court to approve Alabama's procedures for reviewing punitive damage awards in [*Haslip*]." 627 So. 2d at 894-95; *see id.* at 898 n.10, 900-01.[14] Indeed, the Alabama Supreme Court's decisions invalidating legislative attempts to reform the State's punitive damage system directly undermine central reasoning of not only the majority opinion in *Haslip*, but also that of Justice Scalia's concurring opinion, which rested, in part, on the assumption that Alabama and other "[s]tate legislatures . . . have the power to restrict or abolish the common-law practice of punitive damages." *Haslip*, 499 U.S. at 39 (Scalia, J.,

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[14] In *Henderson*, Justice Maddox also reiterated that the Alabama Supreme Court's previous nullification of the independent judicial review procedure in *Armstrong* was inconsistent with *Haslip*, and added that "I believe that the Supreme Court would be interested in knowing that this Court raised the [state constitutional] arguments on its own." *Id.* at 901 n.15.

concurring).[15] As Justice Houston (who had crafted the *Green Oil* factors) has observed, punitive damages in Alabama are now "above the law" that the state legislature is empowered to enact. *Henderson*, 627 So. 2d at 914 (Houston, J., dissenting).

Accordingly, events since *Haslip* have proven that Justice O'Connor was correct when she observed:

> Even if judicial review of award amounts could potentially minimize the evils of standardless [jury] discretion, Alabama's review procedure is not up to the task. . . . [T]he primary component of Alabama's review mechanism is deference. . . Reviewing courts are thus required to uphold the jury's exercise of unbridled, unchanneled, standardless discretion unless the amount happened upon by the jury cannot be reconciled with even the most generous application of the *Green Oil* factors.

Haslip, 499 U.S. at 56 (O'Connor, J., dissenting) (citations omitted). Indeed, "[p]ost-*Haslip* reviews by the [Supreme Court of Alabama] . . . indicate that the procedures, when actually applied, are not adequate and meaningful." *Inter-*

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[15] In arguing before this Court in *Haslip* that the Alabama system comported with due process, counsel for respondents placed particular emphasis on the authority of the legislature to intervene and address any perceived unfairness to defendants resulting from the Alabama system:

> "MR. ENNIS: . . .
>
> This Court should not expand upon that traditional understanding of due process and throw settled State tort law into complete disarray . . . *without compelling reason to believe that the legislative process is closed or is incapable of addressing that problem.*"

Henderson, 627 So.2d at 900-01 n.14 (Maddox, J., concurring and dissenting) (emphasis by Justice Maddox) (quoting transcript of oral argument in *Haslip*).

continental Life Ins. Co., 598 So. 2d at 892 n.4 (Maddox, J., concurring).

B. The Alabama Supreme Court's Application Of Its Post-Verdict Review Standards In This Case Demonstrates That The Alabama System, In Practice, Does Not Bear Even A Passing Resemblance To The Process Represented To And Approved By This Court In *Haslip*.

The post-verdict review conducted by the court below aptly demonstrates that the Alabama punitive damage system has proven in practice to bear not even a passing resemblance to the process envisioned by this Court in *Haslip*. As Justice Houston observed below, in Alabama, there is "no standard by which to determine whether a wrongful death award is excessive or inadequate," other than whether "five members of [the Alabama Supreme Court] hold that it is excessive or inadequate," App. E, *infra*, 101a, and that was the only identifiable basis for upholding the $4,000,000 punitive damage award for wrongful death here. In fact, less than two weeks before its September 10, 1993 decision in this case the Alabama Supreme Court had "affirmed an award of $500 in a wrongful death case" in which the wrongful act "was no less culpable than the act or omission of Sears and State Industries in the case at issue." *Id.* (citing *Rose* v. *Rogers*, 1993 WL 325340, No. 1920032 (Ala. Aug. 27, 1993)).

Moreover, although the *Green Oil* factors purport to include a comparison between the punitive damage award and the "harm that actually occurred," the court below did not mention that fact when it drastically reduced the compensatory damages while leaving the punitive damages standing. Nor did the court conduct any kind of rational "comparative analysis," *see Haslip*, 499 U.S. at 21, which presumably would have included a comparison among the five different punishments imposed in this case and an explanation of how such varying awards could be permitted

to punish the same act. And, although the Alabama post-verdict review standards assume that "the existence of other civil awards against the defendant for the same conduct" will mitigate the punishment, *id.* at 22, the Alabama Supreme Court upheld all five awards against petitioners here without any reduction to account for the redundancy.

The multiple punitive damage awards assessed against petitioners are, on their face, "arbitrary [and] irrational." *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring in part and concurring in the judgment). There is simply no way to justify the imposition of separate punitive damage awards ranging from $250,000 to $1,000,000 to $4,000,000 to punish a single act in the same case. The aggregate $6,500,000 punitive judgment bears no relationship whatever to the "severity of the offense," *Haslip*, 499 U.S. at 22, which involved an alleged "failure to warn" about a product manufactured eight years prior to the respondents' injuries in 1989 and that indisputably was accompanied by detailed, adequate written warnings when it was sold in 1984.

The punishments in this case also were imposed by the same jury that awarded Mrs. McCord $750,000 in compensatory damages in the absence of *any* proof of actual injury and where the Alabama Supreme Court determined she was only entitled to $1. If this does not constitute an "objective indicia" of "bias, passion or prejudice on the part of the jury," *TXO*, 113 S. Ct. at 2725 (Kennedy, J., concurring), that constitutionally taints the jury's verdict, it is hard to imagine what would.

In short, this case amply demonstrates that the Alabama system upheld in *Haslip* has, in practice, failed to afford defendants constitutionally adequate judicial scrutiny of punitive damage awards.

C. This Court Should Grant Plenary Review Because The Court's Endorsement Of The Alabama System In *Haslip* Has Resulted In That System Becoming The Model For Other State Punitive Damage Regimes.

This case presents the Court with the opportunity to reassess the constitutional validity of the Alabama punitive damage system in light of how that system has operated since *Haslip*. The need for such review is pressing because the Alabama system is being looked to as the model for courts in numerous States in fashioning standards and procedures for imposing punitive damages.[16] But the Alabama system, as shown above, is not a model of due process, but rather an *ad hoc*, arbitrary and utterly unfair punishment mechanism.

Indeed, in the punitive damage case currently under the plenary review of this Court, the lower court made extensive references to the Alabama punitive damage system approved in *Haslip* in evaluating the validity of the Oregon standards and procedures for the imposition of punitive damages. *See Oberg* v. *Honda Motor Co., Ltd.*, 851 P.2d 1084, 1091-98 (Ore. 1993), *cert. granted*, 114 S. Ct. 751 (1994) (No. 93-644). Although the Alabama system as represented by respondents in *Haslip* purported to accord

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[16] *See, e.g., Morgan* v. *Woessner*, 997 F.2d 1244, 1254-59 (9th Cir. 1993) (comparing federal and California punitive damage standards and procedures with Alabama system and adopting Alabama-style post-verdict review procedures and standards), *cert. dismissed*, 114 S. Ct. 671 (1994); *Johnson* v. *Hugo's Skateway*, 974 F.2d 1408, 1414-15 (4th Cir. 1992) (comparing Virginia system with Alabama system); *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 904-10 (W. Va. 1991) (comparing West Virginia system with Alabama system and adopting Alabama-style procedures and standards); *Gamble* v. *Stevenson*, 406 S.E.2d 350, 353-54 (S.C. 1991) (comparing South Carolina system with Alabama system and adopting Alabama-style procedures and standards).

stringent post-verdict review,[17] the Alabama system in practice provides little, if any, more protection against arbitrary punitive damage awards than does the Oregon system that is the subject of this Court's present review. Accordingly, this Court should grant certiorari to reexamine the Alabama system in conjunction with its pending review in *Oberg* to provide clearer and more definite guidance regarding the constitutional requirements for post-verdict judicial review of punitive damage awards, and to prevent the capricious Alabama system from being replicated across the country.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and set this case for plenary consideration.

April 7, 1994

Respectfully submitted,

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[17] *See* Brief for Respondents at 35, *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991) (No. 89-1279) ("The jury's judgment is then subject to *exacting substantive scrutiny* to ensure that the award is not excessive in relation to the State's objectives. The trial and appellate courts *carefully* and *rigorously* apply the substantive standards articulated in *Hammond* and *Green Oil* and conduct a comparative analysis of other cases to ensure the verdict falls within a reasonable range.") (emphasis added).

APPENDIX

APPENDIX A

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1993

1911519

Sears, Roebuck and Company and State Industries, Inc.

v.

Annie Harris, as administratrix of the estate of Joyce Simpson, deceased, et al

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Appeal from Lowndes Circuit Court
(CV-90-35)

RELEASED

SEP 10 1993

CLERK
SUPREME COURT OF ALABAMA

ALMON, JUSTICE.

The defendants Sears, Roebuck and Company and State Industries, Inc., appeal from a $12,000,000 judgment entered on verdicts in favor of the five plaintiffs in a products liability action. The plaintiffs are Ruth McCord; Louisiana Waddell; and Annie Harris, who sued as administratrix of the estate of her deceased minor daughter Joyce Simpson and as next friend and mother [2] of her

minor children Felicia D. Simpson and Janice D. Simpson.[1] On December 17, 1989, Joyce Simpson died and Louisiana Waddell, Felicia Simpson, and Janice Simpson suffered personal injuries from carbon monoxide poisoning while they slept in Ruth McCord's mobile home. The plaintiffs brought a wrongful death and personal injury action based on the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") and on negligent- and/or wanton-failure-to-warn theories, alleging that a defective Kenmore II gas water heater manufactured by State Industries and sold by Sears, Roebuck and Company caused the carbon monoxide poisoning.

ISSUES

The principal issues, broadly stated, are (1) Whether the plaintiffs presented substantial evidence that the water heater was the actual cause of the death and injuries suffered by the plaintiffs and their decedent; (2) Whether, as a matter of law, the water heater was substantially altered between the date of sale and [3] the date of the accident; (3) Whether the evidence supports a finding that the improper installation of the water heater was a foreseeable misuse of the product; (4) Whether there was substantial evidence that the failure to provide adequate warnings on the water heater proximately caused the death and injuries suffered by the plaintiffs and their decedent; (5) Whether

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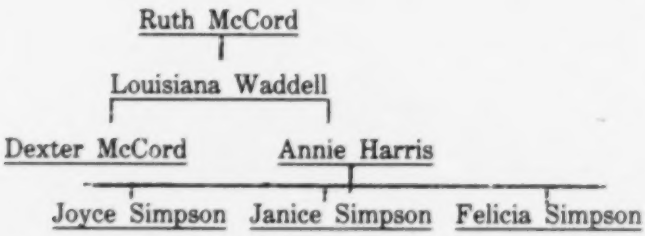
[1] The plaintiffs are all members of the same family. The following diagram shows the relationships among the family members involved in this case:



the trial court erred to reversal in allowing testimony of similar accidents to prove notice of the risk of harm caused by defects in the water heater; (6) Whether the plaintiffs presented clear and convincing evidence of wantonness; and (7) Whether the awards of compensatory and punitive damages are due to be set aside on the ground that they are excessive.

FACTS

State Industries manufactured the Kenmore II gas water heater for Sears in 1981. Sears approved the design and all labelling. Sears and State Industries designed and marketed the water heater so that consumers could install it themselves. A label on the water heater stated, "Let Sears Arrange Installation . . . or you can install it yourself." The water heater was designed for use with natural gas. The water heater, however, would burn liquid propane ("LP") gas, and nothing in its design prevented the consumer from connecting it to an LP gas line. The use of LP gas in an appliance designed for use with natural gas produces unusually large amounts of carbon monoxide because of incomplete combustion of the LP gas. [4]

The water heater came with a 15-page instruction manual inserted in a plastic pouch, which was attached to the water heater by a piece of adhesive tape. In the manual were instructions telling users how to install the water heater properly. According to the manual, proper installation included, among other things, venting the water heater by means of a pipe extending from the draft hood of the water heater to the outdoors. Fitted to the top of the water heater, the draft hood covered the flue outlet and collected exhaust gases, which were conveyed through the flue from the combustion chamber at the base of the water heater.

In addition to this manual, the water heater itself had labels containing warnings and instructions for ensuring

proper clearance from surrounding walls in closet or alcove installation and containing instructions for lighting the water heater's pilot light. The alcove and closet installation label made several references to the instruction manual and stated that the water heater should be installed in accordance with applicable local codes.

None of the labelling on the water heater warned of the dangers of carbon monoxide poisoning or explained the necessity of venting the water heater. Also, none of the labelling specifically informed the consumer that the water heater was to be used only with natural gas, and, consequently, not with liquid propane gas. One label, however, displaying sundry specifications of the water heater, such as capacity, water pressure, etc., stated "Equipped for NAT." [5] The "EnergyGuide" label also stated that its estimates of the water heater's annual cost of use were "based on a national average of NATURAL."

The water heater in this case was originally purchased from Sears in 1984 by Sam Ferlisi. After properly installing it himself and using it for a brief period in his gasoline service station, Ferlisi stored it for several years in his garage. Ferlisi subsequently gave the water heater to Ruth McCord. In November 1989, Ruth McCord had her grandson Dexter McCord install the water heater in the double-wide mobile home she shared with her great-granddaughters. (See note 1.) When Dexter McCord installed the water heater, the instruction manual was missing. Missing also were the draft hood and the inner and outer doors to the combustion chamber, which were designed to cover the opening to the combustion chamber and to be removable in order to allow users to light the water heater pilot light. Ruth McCord's mobile home was originally equipped with a small electric water heater located in a narrow closet in one of the bathrooms. After removing the electric water heater, Dexter McCord installed the gas water heater and connected it to an LP gas tank. He also installed the water heater without a pipe

to vent carbon monoxide and other exhaust gases outside the mobile home. At trial, Dexter McCord testified that when he installed the water heater he did not know that gas water heaters required venting. He also stated that he did not know the difference between natural gas and LP gas. [6]

On December 17, 1989, Louisiana Waddell and her three grandchildren, Joyce Simpson, Janice Simpson, and Felicia Simpson spent the night in Ruth McCord's mobile home. Ruth McCord was not present, because she had been admitted to a hospital on December 14, 1989, for a health problem apparently unrelated to this case. The next morning Dexter McCord found Louisiana, Joyce, and Janice unconscious, with their eyes rolled back in their heads and foam around their mouths. Felicia's eyes were open and appeared normal, but she was unresponsive and she too was foaming at the mouth. The four were taken to various hospitals and treated for severe carbon monoxide poisoning.[2] Joyce Simpson subsequently died. Joyce Simpson was pregnant, and her unborn child died with her.

Barnie Gilliland, an inspector with the Alabama Liquified Petroleum Gas Board, investigated the incident for the LP Gas Board three days later. In his report, Gilliland concluded that the improperly installed natural gas water heater caused the injuries and the death. At trial, Sears and State Industries sought to prove that the water heater

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[2] When Louisiana Waddell, Felicia Simpson, and Janice Simpson were admitted, the levels of carbon monoxide in their blood was as follows: Louisiana Waddell 41%, Felicia Simpson 25%, Janice Simpson 14.6%. Dr. Edwin T. Johnson, the plaintiffs' medical expert, testified that these tests were conducted after they had been administered pure oxygen and, therefore, that the levels of carbon monoxide in their blood had probably been much higher.

According to Dr. Johnson's undisputed testimony, a level of 60% is lethal for anyone; below this threshold a variety of factors determine whether the exposed person will survive.

was not lit on the night the accident occurred. Denny Register, an employee of the Highland Home Propane [7] Gas Company, testified that he had made a service call to the mobile home on December 16, the day before the accident. According to Register, none of the family was home. Register stated that a neighbor let him in and that before he left he turned off the gas to Ruth McCord's mobile home at the LP tank. To rebut Register's testimony, the plaintiffs introduced circumstantial evidence that the trailer was locked on December 16, 1989, and that only Louisiana Waddell and Dexter McCord had keyes to the trailer. Louisiana Waddell also testified that on the night of the accident she cooked with the gas stove, which was connected to the same LP gas tank.

The plaintiffs' complaint contained three counts: (1) violation of AEMLD, (2) negligence, and (3) wantonness, all based on the design, manufactured, labelling, distribution, and/or sale of the water heater.

To prove the AEMLD claim, the plaintiffs produced an expert, Wayne McCain, who testified that the water heater was defective or unreasonably dangerous in three respects. First, McCain stated his opinion that the water heater was defective because it violated the American National Standards Institute ("ANSI") standard 1.27.1. McCain stated that ANSI 1.27.1 (1975) required that an installation and instruction manual be permanently attached to the water heater. According to McCain, the fact that the pouch containing the manual was only taped to the water heater violated ANSI standards and made the water heater unreasonably dangerous. Second, McCain stated [8] that the water heater was defective because it did not have either a carbon monoxide sensor or a carbon monoxide shut-off device. These devices, McCain testified, were commercially available at the time the water heater was designed and manufactured. McCain also stated that either of these devices would have prevented the accident by either sounding an alarm or shutting off the water heater when it detected

certain levels of carbon monoxide. Third, McCain testified that the water heater was defective because the labelling on the water heater failed to instruct users to vent the water heater and to connect it to natural gas, and not LP gas, and failed to warn users of the hazards of carbon monoxide poisoning.

To prove their related wanton- or negligent-failure-to-warn claims, the plaintiffs introduced McCain's expert testimony. McCain stated that in his opinion the labelling on the water heater inadequately apprised users of the need to vent the water heater and connect it to natural gas, and not LP gas, and that the labelling failed to warn of the dangers of carbon monoxide poisoning.

To prove wantonness, the plaintiffs presented the testimony of McCain and Clifford Carlton, a senior product engineer for State Industries, and other evidence to show that when the water heater was designed and manufactured, both Sears and State Industries knew that consumers were dying or otherwise suffering injuries from carbon monoxide poisoning caused by the failure to vent gas water heaters properly. [9]

For their defense, Sears and State Industries presented evidence that the water heater was not the source of the carbon monoxide gas and introduced expert testimony indicating that the water heater was not defective when made and that it had been substantially altered. The defendants also raised the affirmative defense of product misuse.

The trial court entered a $12,000,000 judgment on a jury verdict in favor of the plaintiffs, awarding the following amounts in compensatory and punitive damages:

Annie Harris, as administratrix of the estate of Joyce Simpson	$4,000,000 (Wrongful Death)
Felicia Simpson	$2,000,000 (Compensatory) $1,000,000 (Punitive)

Janice Simpson	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Louisiana Waddell	$2,000,000 (Compensatory) $1,000,000 (Punitive)
Ruth McCord	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Total	$12,000,000

The trial court denied Sears and State Industries' post-judgment motion for J.N.O.V., or, in the alternative, for a new trial or remittitur, and made findings pursuant to *Hammond v. City of Gadsden,* 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989). [10]

DISCUSSION

Because many of the major issues in this case concern the sufficiency of the evidence and the preservation of sufficiency questions for appellate review, we begin our discussion with a general review of the applicable principles of law.

Rule 50(b), Ala. R. Civ. P., provides a specific procedure for challenging the sufficiency of the evidence:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may file a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . ."

Id. In accordance with this procedure is the well-settled rule "that a motion for a directed verdict must be made at the close of all the evidence and that a timely post-trial motion for judgment notwithstanding the verdict must be subsequently made before an appellate court may consider on appeal the insufficiency-of-evidence issue directed to the jury's verdict." *Bains v. Jameson,* 507 So.2d 504, 505 (Ala. 1987); see also *Great Atlantic & Pacific Tea Co. v. Sealy,* 374 So.2d 877 (Ala. 1979); *Black v. Black,* 469 So.2d 1288 (Ala. 1985); *Housing Auth. of the City of Prichard v. Malloy,* 341 So.2d 708 (Ala. 1977). "The motion for a directed verdict may be oral even though the better practice dictates a written motion for the sake of clarity and to prevent misunderstanding." *Pattway v. Pepsi Cola Bottling Co.,* 337 So.2d [11] 757, 759 (Ala. 1976); see *Lawrence v. Lackey,* 451 So.2d 278 (Ala. 1984).

If a sufficiency issue has been properly raised and preserved, the standard of review applicable to a motion for J.N.O.V. is identical to the standard used by the trial court in ruling on a directed verdict motion. *John R. Cowley & Bros., Inc. v. Brown,* 569 So. 2d 375 (Ala. 1990); *Alpine Bay Resorts, Inc. v. Wyatt,* 539 So. 2d 160 (Ala. 1988). Like a directed verdict, a J.N.O.V. is proper when the party with the burden of presenting evidence has failed to present "substantial evidence" in support of its position. *John R. Cowley & Bros. Inc. v. Brown, supra;* § 12-21-12(a), (c), Ala. Code 1975. "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."*West v. Founders Life Assurance Co. of Florida,* 547 So. 2d 870, 871 (Ala. 1989). In ruling on a motion for a directed verdict or for a J.N.O.V., the court views the entire evidence and makes all reasonable inferences therefrom in favor of the nonmoving party. *Pickett v. United States Steel Corp.,* 495 So. 2d 572 (Ala. 1986).

Causation in Fact

Because it relates to all of the plaintiffs' claims, we begin our discussion of the merits of this case by addressing the issue of causation. The issue raised by Sears and State Industries is whether the trial court erred in not directing a verdict on all [12] claims on the basis that the plaintiffs failed to prove that the water heater was lit and working at the time of the accident.

The plaintiffs argue initially that the defendants failed to preserve this issue for appellate review. The plaintiffs contend that although the defendants' motion for J.N.O.V. specifically raised this issue, their motion for a directed verdict at the close of all of the evidence did not.

After renewing, at the close of all the evidence, the motion for a directed verdict they filed at the close of the plaintiffs' evidence, Sears and State Industries made a second, oral motion for directed verdict on the specific ground that the plaintiffs had presented no evidence that the pilot light on the water heater was lit on the night of the accident. The record also shows that in accordance with the procedure of Rule 50, Ala. R. Civ. P., the defendants properly renewed their motion for a directed verdict on this ground when they filed their post-judgment motion for J.N.O.V. We conclude, therefore, that this issue has been properly preserved for our review.

Sears and State Industries argue that the trial court erred in not directing a verdict in their favor on all counts because it is undisputed, they say, that on December 16, 1989, Danny Register cut off the supply of gas to the mobile home at the tank after inspecting for gas leaks and that no one relit the pilot light on the water heater before the accident. Undeniably, the defendants say, the source of the carbon monoxide was not the water heater. [13] In all likelihood, they contend, the source was the gas stove, which, they say, the McCord family was using to heat the mobile home.

We note initially that because it was undisputed that carbon monoxide poisoning caused the injuries and the death, the critical factual determination is the *source* of the carbon monoxide. Viewing the evidence and all reasonable inferences therefrom in favor of the plaintiffs, we hold that the Gilliland report and other circumstantial evidence constitute substantial evidence from which a fair-minded person could reasonably infer that the water heater was the source of the carbon monoxide that caused the injuries and the death. The argument advanced by Sears and State Industries mistakenly assumes that because the plaintiffs were not able to dispute Danny Register's testimony with direct evidence, they did not present *any* substantial evidence to establish causation.

The Gilliland report is evidence of such weight and quality that a reasonable trier of fact could infer that the water heater emitted the carbon monoxide that caused the injuries:

> "From the information obtained, it appears that the natural gas water heater was improperly put into service. At one time, an electric water heater was installed at the location where the nat. gas water heater was installed. There were no means for combustion air and venting for a gas water heater in this compartment. There were signs of smoke at the top of the compartment access door."

In addition, the plaintiffs presented circumstantial evidence to rebut and challenge the credibility of the testimony of Danny [14] Register, who was an employee of Highland Home Propane Gas Company, a defendant originally named in this action.[3] Moreover, this circumstantial

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[3] Before this case went to trial, the plaintiffs and Highland Home Propane Gas Company entered into a settlement agreement, and all claims against Highland Home were dismissed.

evidence, in the aggregate, constitutes still further substantial evidence tending to prove that the water heater was the source of the carbon monoxide. First, there was testimony from McCord family members that, contrary to his testimony, Danny Register could not have entered the locked mobile home on December 16 when the McCord family was not at home. Although Danny Register stated that a neighbor, whom he could not later identify or remember, with a key let him into the mobile home to inspect it for leaking gas, Louisiana Waddell testified that she and Dexter McCord were the only people who had keys to the mobile home. Second, members of the McCord family testified that no one relit the pilot light on the gas stove after December 16, and Louisiana Waddell testified that after cooking dinner on the gas stove the evening of December 17, she turned off the burners she had used.

Third, the plaintiffs presented circumstantial evidence creating an inference that the water heater was the only gas appliance operating in the mobile home on the evening of the accident. Ruth McCord's mobile home had four fuel-burning appliances: a kerosene heater, a gas furnace, a gas stove, and the water heater. It was undisputed that neither the kerosene heater nor the furnace was being used at the time of the accident. The [15] only two possible sources of carbon monoxide, therefore, were the gas stove and the water heater. Because Louisiana Waddell testified that she turned the stove off after cooking with it on the evening of the accident, a fair-minded person could reasonably infer that the water heater was the only possible source of the carbon monoxide and thus was the cause in fact of the injuries and death.

After carefully reviewing the record, we cannot say that the plaintiffs failed to present an issue of fact for the jury. In fact, in light of the disparate, conflicting evidence presented, we think the question of causation in this case is precisely the kind of question that is properly within province of the jury.

AEMLD Claim

In *Kelly v. M. Trigg Enterprises, Inc.*, 605 So. 2d 1185, 1191 (Ala. 1992), the Court restated the elements of an AEMLD claim established in *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 132-33 (Ala. 1976), and *Atkins v. American Motors Corp.*, 335 So.2d 134, 141 (Ala. 1976):

> " 'To establish liability, a plaintiff must show:
>
> " '(1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> " '(a) the seller is engaged in the business of selling such a product, and
>
> " '(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. [16]
>
> " '(2) Showing these elements, the plaintiff has proved a prima facie case although
>
> " '(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> " '(b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller.' "

605 So. 2d 1191; see also *Yamaha Motor Co. v. Thornton*, 579 So. 2d 619, 621 (Ala. 1991).

The first issue that Sears and State Industries state in regard to the plaintiffs' AEMLD claim is whether the trial court erred in not directing a verdict for the defendant on the basis that the plaintiffs failed to prove that the lack of a carbon monoxide detector or shut-off device rendered the water heater defective.

The plaintiffs argue initially that the defendants failed to raise this issue in the trial court and therefore cannot raise it now on appeal. After meticulously examining the record, we agree. Although Sears and State Industries presented expert testimony and other evidence to rebut the testimony of Wayne McCain that the failure to include various safety devices in the water heater's design rendered it defective, they did not raise an issue of the sufficiency of the plaintiffs' evidence, either in their written and oral motions for directed verdict at the close of the evidence or in their post-judgment motion for J.N.O.V. The defendants' motion for J.N.O.V., or, in the alternative, a new trial or remittitur contained 57 assignments of error; not one of them [17] related to the sufficiency of the plaintiffs' evidence on this issue of defectiveness. We hold, therefore, that the defendants waived appellate review of this issue.

The second AEMLD issue is whether the trial court erred in not directing a verdict for the defendants on the basis that the plaintiffs failed to prove that the condition of the water heater had not been substantially altered between the date of sale and the date of the accident.

Sears and State Industries argue that undisputed evidence shows that when the water heater was installed its draft hood and vent pipe, the inner and outer access doors to the combustion chamber, and the plastic pouch containing the instruction manual were missing. Therefore, the defendants contend, the plaintiffs failed to carry their burden of establishing that the water heater had not been substantially altered between its purchase and the time of the accident.

The plaintiffs respond by arguing that they met their burden of production either because, they say, the alterations did not cause the accident or because the alterations were reasonably foreseeable to Sears and State Industries. It was foreseeable, the plaintiffs say, that the pouch containing the instruction manual, as well as the draft hood

and vent pipe, would be removed from the water heater. The plaintiffs also argue that it was foreseeable that such alterations to the condition of the water heater would cause the injuries and death. [18]

An essential element of an AEMLD claim is proof that the product reached the consumer without substantial change in the condition in which it was sold. *Clarke Indus., Inc. v. Home Indemn. Co.*, 591 So. 2d 458, 462 (Ala. 1991); see also *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981). However, the mere fact that a product has been altered or modified does not necessarily relieve the manufacturer or seller of liability. *Johnson v. Niagara Machine & Tool Works*, 555 So. 2d 88, 91 (Ala. 1989). A manufacturer or seller remains liable if the alteration or modification did not in fact cause the injury, *Johnson*, 555 So.2d at 91 (quoting *Industrial Chem. & Fiberglass Corp. v. Hartford Acc. & Indemn. Co.*, 475 So. 2d 472, 476 (Ala. 1985)); *Bullen v. Roto Finishing Systems*, 435 So. 2d 1256 (Ala. 1983); *Brown v. Terry*, 375 So. 2d 457 (Ala. 1979), or if the alteration or modification was reasonably foreseeable to the manufacturer or seller. *Clarke Indus.*, 591 So. 2d at 462; *Beloit Corp. v. Harrell*, 339 So. 2d 992 (Ala. 1976).

After reviewing the record and examining the exhibits[4] in a light most favorable to the plaintiffs and after drawing all reasonable inferences in their favor, we hold that the changes in the water heater either were not substantial alterations or, if they were substantial alterations, were foreseeable. First, the evidence shows that the vent pipe was not sold with the water [19] heater. The instruction manual states that the customer must provide his own vent pipe. Therefore, the absence of a vent pipe cannot be a substantial alteration of the product. Second, substantial evidence shows that the instruction manual, the

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[4] The record on appeal included exhibits, among which were a jacket top, a draft hood, and a vent pipe.

draft hood, and the doors to the combustion chamber were detachable and easily removed. When the water heater was originally sold, the instruction manual was contained in a plastic pouch affixed to the water heater by adhesive tape. The draft hood was attached by slipping tabs located on the legs of the draft hood into holes placed in the jacket top covering the top of the water heater. Likewise, the inner and outer doors to the combustion chamber were affixed by slipping tabs on the doors into holes located in the combustion chamber aperture. The doors appear to have been designed to be removable, in order to allow easy lighting of the pilot light. Moreover, although the defendant's expert testified that the doors were important safety devices, there was no evidence that the absence of these doors was a cause of the accident. Thus, the removal of the manual, the draft hood, and the doors was a foreseeable alteration of the water heater.

For the foregoing reasons, the trial court did not err in denying the motions for a directed verdict on the basis of a substantial alteration of the product.

The third issue raised with regard to the plaintiffs' AEMLD claim is whether the trial court erred in not directing a verdict [**20**] for the defendants based on the affirmative defense of product misuse.

Sears and State Industries argue first that the facts are undisputed that the plaintiffs failed to carry their burden of proving, as part of their prima facie case, that the water heater was used as intended by the manufacturer. The defendants contend that because the water heater was improperly installed, the product was not used as intended and that it was the improper installation, not any alleged defect, that proximately caused the injuries and the death.

Contrary to the contention of Sears and State Industries, proof that a product was used as intended is not an element of a prima facie case under the AEMLD. In *Kelly, supra,* the Court recently reaffirmed the rule that a user's

misuse of an allegedly defective product is an affirmative defense to liability under the AEMLD, which the defendant must plead and prove. 605 So. 2d at 1192; see also *Banner Welders, Inc. v. Knighton*, 425 So. 2d 441, 448 (Ala. 1982); *McCalab v. Mackey Paint Mfg Co.*, 343 So. 2d 511, 514 (Ala. 1977); *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala. 1976). Therefore, the plaintiffs did not have the burden of proving either that they properly installed the water heater or, more generally, that they used the water heater as intended by the manufacturer. However, because the defendants submitted evidence and moved for a directed verdict on this affirmative defense, the plaintiffs were required to present substantial evidence that the [21] water heater was not misused or that the misuse was reasonably foreseeable. § 12-21-12, Ala. Code 1975.

" 'When asserting misuse as a defense under AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer. Stated differently, the plaintiff's misuse of the product must not have been 'reasonably foreseeable by the seller or manufacturer.' ' " *Kelly*, 605 So. 2d 1192 (quoting Edward C. Martin, *Alabama's Extended Manufacturer's Liability Doctrine (AEMLD)*, 13 Am. J. Trial Advoc. 983, 1040 (1990)). Ordinarily, the plaintiff's misuse of an allegedly defective product is a factual issue for the jury. *Kelly*, 605 So. 2d 1192; *Banner Welders, Inc.*, 425 So. 2d at 448; *Beloit Corp. v. Harrell*, 339 So. 2d 992, 997 (Ala. 1976). Thus, although the appellants correctly assert that Dexter McCord did not use the water heater as intended when he improperly installed it, the inquiry under our law does not end here. The question is whether this misuse of the product was reasonably foreseeable by Sears and State Industries.

Evidence that plaintiffs introduced to prove wantonness is particularly relevant to the issue of foreseeability presented here. First, McCain testified that in 1980 it was generally known that vent failures occurred and that peo-

ple could be killed by carbon monoxide poisoning as a result of such vent failures. McCain also testified that he himself was aware of several cases arising before 1984 in which a Kenmore II gas water heater had [22] been inadequately vented and connected to LP gas and had caused injury. Second, to prove notice or knowledge on the part of Sears and State Industries, the plaintiffs introduced, as exhibits, copies of a complaint and a summons from a wrongful death action filed against Sears and State Industries in August 1982. The complaint alleged that Sears and State Industries had breached express and implied warranties by failing to give adequate instructions and warnings regarding the dangers of carbon monoxide poisoning caused by connecting a Kenmore gas heater to LP gas. Third, Clifford Carlton, a senior product engineer with State Industries, testified, as an adverse witness, that when the water heater was being designed and manufactured, State Industries knew that consumers were being injured and killed by carbon monoxide poisoning as a result of improper installation:

"Q. Y'all were aware that folks were being killed by gas appliances, weren't you?

"A. Correct.

"Q. And you knew that y'all were in the water heater business using gas to fuel those water heaters?

"A. Correct.

"Q. And you knew that some folks were being killed because of the gas water heaters putting out carbon monoxide, didn't you?

"A. Improper installation, yes.

"Q. Did you ever ask any—you knew at that time that people were installing them wrong, sir?

"A. Could.

"Q. They—[23]

"A. People can.

"Q. They can?

"A. Yes.

"Q. And y'all knew as far back as the time this was done, that you put this one together and designed it? Sir?

"Are you telling this jury that your company knew back before this water heater was designed and manufactured that people out there were not putting them in like y'all wanted them to, or Sears, and carbon monoxide poisoning was resulting, and folks were getting killed. Y'all knew it back then, didn't you?

"A. I suppose so."

We hold that the plaintiffs presented substantial evidence to prove that when State Industries and Sears designed, manufactured, and distributed the Kenmore II gas water heater, it was reasonably foreseeable that consumers would improperly install it by connecting it to LP gas and failing to vent it properly.

Sears and State Industries' second "product misuse" argument is that the improper installation was an unforeseeable misuse, as a matter of law, because the installation constituted a violation of a regulation promulgated by the Alabama Liquified Petroleum Gas Board.

Chapter 530-X-2-.15, Alabama Liquified Petroleum Gas Board Administrative Code, makes it unlawful for a person to install a petroleum gas appliance unless the person obtains a valid permit and meets all requirements of the law. Among the requirements of this regulation is the timely notification of an authorized liquid petroleum gas dealer of any action taken affecting an LP gas [24] appliance. Violation of this regulation is punishable by not more than

$1,000 or six months' imprisonment. § 9-17-109(a), Ala. Code 1975. It is undisputed that Ruth and Dexter McCord violated this regulation.

This Court has not previously decided the precise issue raised by the defendants; however, it has addressed the issue of what type of criminal conduct on the part of a plaintiff will bar recovery in a products liability action. In its recent opinion in *Oden v. Pepsi Cola Bottling Co. of Decatur, Inc.*, [Ms. 1910502, May 28, 1993] ___ So. 2d ___ (Ala. 1993), the Court held that the plaintiff, whose minor child was crushed to death as he and his friends attempted to steal soft drinks from a vending machine by tilting it forward, was barred from recovering in a products liability action alleging defects in the machine. The Court stated that a plaintiff is barred from recovering damages for "injuries suffered as a direct result of the injured party's knowing and intentional participation in a crime involving moral turpitude." *Id.* at ___ (interpreting *Minkle v. Railway Express Agency*, 242 Ala. 374, 6 So.2d 417 (1942)).

We find *Oden* instructive. We do not believe that the McCords' violation of 530-K-2-.15 was a crime involving moral turpitude. This Court has traditionally considered an act involving moral turpitude to be *malum in se*, that is, an act wrong in itself regardless of its being punishable by law, and not *malum prohibitum*. *Sims v. Callahan*, 269 Ala. 216, 112 So. 2d 776 (1959); [25] *Ex parte Marshall*, 207 Ala. 566, 93 So. 471 (1922); *Pippin v. State*, 197 Ala. 613, 73 S. 340 (1916). The McCords' conduct was not *malum in se*. Therefore, because Ruth and Dexter McCord's violation of the Alabama Liquified Petroleum Gas Board Administrative Code would not bar them from bringing an action under the AEMLD, we hold that this violation, without more, does not constitute what would be, as a matter of law, an unforeseeable misuse. Moreover, we note that Dexter McCord was not a plaintiff in this action.

Negligent-/Wanton-Failure-to-Warn Claim

Regarding the plaintiffs' negligent- or wanton-failure-to-warn claim, Sears and State Industries raise the issue of whether the trial court erred in not directing a verdict for the defendants on the basis that the plaintiffs failed to prove that Dexter McCord would have read additional warnings. This issue bears on the element of proximate causation.

Proximate causation is an essential element of a prima facie case of either negligent or wanton failure to adequately warn. *Gurley v. American Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987); see also *Deere & Co. v. Gross*, 586 So. 2d 196, 198 (Ala. 1991). A negligent- or wanton-failure-to-warn claim cannot be submitted to a jury unless there is substantial evidence that the allegedly inadequate warning would have been read and heeded and that it would have prevented the accident. *Precise Engineering Inc. v. LaCosbe*, [Ms. 1911918, June 18, 1993] ___ So. 2d [26] ___ (Ala. 1993); *Clarke Indus., Inc. v. Home Indem. Co.*, 591 So. 2d 458, 461-62 (Ala. 1991); *Deere & Co.*, 586 So. 2d at 198; *Gurley*, 505 So. 2d at 361; *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 971 (Ala. 1985).

Citing *Kelly v. M. Trigg Enterprises, Inc., supra, Deere & Co., supra,* and *E.R. Squibb & Sons, Inc., supra,* Sears and State Industries argue that because Dexter McCord's testimony indicates that he only "looked over" the labels on the water heater, the plaintiffs failed to present substantial evidence that he would have read the warnings that the plaintiffs allege should have been placed on the water heater.

Although Dexter McCord testified that he did not read all the labels on the water heater, he did testify that he read most of them. Dexter McCord recalled reading a label saying "Let Sears Arrange Installation . . . or you can do it yourself," a label containing the operating instructions (which included instructions on how to light the pilot light),

and a label giving instructions regarding minimum clearance for alcove installation. In addition, Dexter McCord read a label containing information, such as the water heater's serial number, model number, maximum hydrostatic pressure, gas pressure, and capacity. Dexter McCord also testified that after installing the water heater he followed the instructions on the operating instructions label when he lit the pilot light.

After reviewing the record in a light most favorable to the plaintiffs and making all reasonable inferences in their favor, [27] this Court concludes that the plaintiffs presented sufficient evidence for the jury to reasonably infer that Dexter McCord would have read additional warning labels had Sears and State Industries provided them. The labels that Dexter McCord testified to reading constitute all the existing labels that were, practically speaking, relevant to installing and operating the water heater safely. Moreover, the fact that Dexter McCord followed the directions for lighting the pilot light included on the operating instructions label also created an inference that he would have followed additional instructions and warnings.

As to the cases cited by Sears and State Industries, we find them distinguishable. Unlike the plaintiffs in this case, the plaintiff in *Deere & Co.* presented absolutely no evidence to show that the allegedly inadequate warning in the owner's manual proximately caused the plaintiff's injuries. Similarly, in *Kelley* and *E.R. Squibb & Sons, Inc.*, the undisputed evidence showed that the plaintiff did not read any of the instructions or warnings furnished with the product.

Evidence of Similar Incidents

The only evidentiary issue Sears and State Industries raise is whether the trial court reversibly erred in allowing plaintiffs' counsel to question McCain about other accidents involving a Kenmore II Sears water heater without, ac-

cording to Sears and State Industries, laying a proper foundation. [28]

During direct examination, plaintiffs' counsel asked McCain if he was familiar with any cases prior to 1984 in which a Sears Kenmore II water heater had been inadequately vented and connected to LP gas. When McCain replied that he was, defense counsel objected.

The defendants argue that it was reversible error for the trial court to allow this questioning without requiring a foundation showing that the other cases arose from "substantially similar circumstances."

It is clear from the context of the challenged question that the plaintiffs were attempting to prove notice, foreseeability, and wantonness, not that the water heater was unreasonably dangerous. Therefore, the requirement of showing a substantial similarity in the condition or thing that caused the alleged injury did not apply. C. Gamble, *McElroy's Alabama Evidence* § 83.01 (4th ed. 1991). We note that the defendants were free to cross-examine McCain and attempt to impeach his testimony; the record, however, reveals that they did not do so on this point. We hold, therefore, that the trial court did not err in permitting this questioning.

Clear and Convincing Evidence of Wantonness

The first issue raised with regard to the punitive damages verdict is whether the $2,500,000[5] award of punitive damages was [29] supported by clear and convincing evi-

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[5] Sears and State Industries do not direct their argument here to the $4,000,000 in punitive damages awarded on the wrongful death claim. We note that § 6-11-20(a), Ala. Code 1975, specifically excludes punitive damages awarded in wrongful death actions from the requirement of proof by "clear and convincing evidence." Sears and State Industries, however, do raise the issue of excessiveness with regard to the $4,000,000 award; that issue is discussed *infra*.

dence of wantonness. The plaintiffs argue that the defendants cannot challenge the punitive damages award on the ground that wantonness was not proved by clear and convincing evidence when they did not raise the issue in their motion for a directed verdict. We disagree.

Although the defendants did not preserve the issue of the sufficiency of the evidence to prove wantonness, they did properly preserve the issue of whether wantonness was proved by clear and convincing evidence for purposes of the punitive damages award, because they raised the issue in their motion for J.N.O.V., or, in the alternative, for a new trial or remittitur.

It is not necessary, *before entry of judgment,* to object to the absence of clear and convincing evidence of wantonness in order to preserve the issue for appellate review. An objection based on a party's failure to present substantial evidence of wantonness is different from an objection based on a party's failure to prove wantonness by "clear and convincing" evidence. The former relates to the issue of whether a party has presented sufficient evidence to present an issue of fact for the jury; the latter relates to whether a party has proved wantonness by sufficient weight of the evidence to justify the jury's imposition of punitive damages. The issue of whether an award of punitive damages is supported by clear and convincing evidence necessarily does not arise either until a [30] party requests an instruction on punitive damages or until after the jury renders a verdict and the trial court enters a judgment. Thus, even though Sears and State Industries did not challenge the sufficiency of the evidence on the claims of wantonness, they did properly raise the issue of whether the award of punitive damages was supported by clear and convincing evidence, in their post-judgment motion for J.N.O.V., or, in the alternative, a new trial or remittitur.

In *Shoals Ford, Inc. v. Clardy*, 588 So. 2d 879 (Ala. 1991), this Court stated the following applicable principles:

> "Whether a defendant's conduct was committed willfully, wantonly, or intentionally is a question for the jury on the issue of punitive damages (*Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986)), and on appeal there is a presumption of correctness as to the amount of punitive damages awarded by the trier of fact. See *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991) (a case in which this Court declared Ala. Code 1975, § 6-11-23(a), § 6-11-24(a), and the parenthetical portion of § 6-11-24(b) unconstitutional).
>
> "In Ala. Code 1975, § 6-11-20(b)(3), 'wantonness' is defined as "conduct which is carried on with a reckless or conscious disregard of the rights and safety of others.' In order to award punitive damages, the wanton conduct must be proven by 'clear and convincing evidence,' Ala. Code 1975, § 6-11-20(a), which is defined in § 6-11-20(b)(4) as follows:
>
> " 'Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.' "[31]

Id. at 884.

Sears and State Industries argue that imposing $2,500,000 in punitive damages on them was error be-

cause, they argue, there was no "clear and convincing evidence" of wantonness. More specifically, they argue that because industry standards did not require a carbon monoxide sensor or a shut-off safety device and because no other manufacturer used them, they had no reason to believe that failure to use them would create an unreasonably dangerous condition.

The evidence introduced by the plaintiffs to prove wantonness, however, belies the defendants' contentions. The plaintiffs presented evidence that the dangers of carbon monoxide poisoning from gas appliances had been generally known in the industry at the time the water heater was designed; that Sears and State Industries had designed, manufactured, marketed, and distributed the Kenmore II gas water heater to be installed by consumers; that Sears and State Industries were actually aware that consumers were misinstalling gas water heaters by connecting them to LP gas and by failing to vent them properly; that Sears and State Industries were actually aware that such improper installation had caused deaths and injuries from carbon monoxide poisoning; that a wrongful death action based on carbon monoxide poisoning caused by connection of a Kenmore II gas water heater to LP has had been filed against Sears and State Industries in 1981; and that notwithstanding knowledge of these facts, Sears and State Industries did not place [32] any additional warning or instruction labels on the water heater or otherwise alter its design.

Addressing the defendants' more specific contention, we note that adherence to ANSI industry standards does not, *in and of itself,* relieve a manufacturer from liability for damages based on claims of wantonness, when other evidence clearly and convincingly shows that it knew of the risk of injury and death posed by its products. *Cf., King v. National Spa & Pool Institute, Inc.,* 570 So. 2d 612 (Ala. 1990). Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused

by its products and do nothing to alter their design or to warn users. The same may be said for the defendants' argument that they could not have been wanton because no other manufacturer of gas water heaters employed a carbon monoxide sensor or shut-off device. Moreover, we note that Clifford Carlton admitted at trial that Ernest Wenzel, the chief designer of the Kenmore II water heater and a member of an ANSI subcommittee on standards for gas water heaters, had for many years actively opposed efforts to require the use of carbon monoxide sensors on gas water heaters.

We hold, therefore, that the evidence set out above, together with other evidence in the record, constituted clear and convincing evidence that Sears and State Industries consciously disregarded the rights and safety of the plaintiffs when they designed, manufactured, and distributed the Kenmore II gas water heater.

Due Process Rights [33]

Sears and State Industries challenge the punitive damages awards under the due process clause of the United States Constitution. The two issues they raise are (1) whether the trial court's judgment violates the due process rights of the defendants on the basis that it does not apprise them of the extent of the punishment imposed for their conduct, and (2) whether the trial court's judgment violates the due process rights of the defendants by meting out multiple and differing punishments for a single wrongful act.

We find that the defendants waived these issues when they requested special verdict forms, of their own drafting, asking the jury to return separate awards of punitive damages for each plaintiff, if the jury chose to award punitive damages. Sears and State Industries cannot now on appeal base an argument for reversal on alleged error that they themselves invited. *E & S Facilities Inc. v. Precision Chip-*

per Corp., 565 So. 2d 54, 60 (Ala. 1990); *Phillips v. Anesthesia Servs., P.C.*, 565 So. 2d 127, 129 (Ala. 1990); *Osborn v. Johns*, 468 So. 2d 103, 110 (Ala. 1985).

Excessiveness of the Jury Verdicts

Sears and State Industries request this Court to condition any affirmance of the judgment on a substantial remittitur of the compensatory and punitive damages awards on the ground that the verdicts are excessive.

Subject to important state constitutional constraints, this Court has the authority under § 12-22-71, Ala. Code 1975, to [34] determine the proper amount of recovery and to affirm the judgment, subject to the filing of a remittitur of the amount in excess of the proper amount, when the Court concludes that the judgment is excessive. The right to a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, § 11, Const. 1901, and a jury verdict may not be set aside or remitted unless the verdict is flawed, thereby losing its constitutional protection, *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1378 (Ala. 1986), or unless, in the case of a punitive damages verdict, it exceeds the amount necessary, in the particular circumstances of the case, to accomplish society's goals of punishment and deterrence, *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

Although Sears and State Industries address their excessiveness-of-the-verdict argument to the particular circumstances of each personal injury plaintiff, their common objection is the absence of severe, long-term or permanent, physical impairment and suffering. As stated by one of the plaintiffs' expert witnesses, Dr. Edwin T. Johnson, individuals may not necessarily suffer long-term effects after being exposed to carbon monoxide gas for an appreciable period. In fact, Dr. Johnson testified, most do not. Although it is true that the plaintiffs' special damages in this case are minor and their long-term symptoms or

permanent injuries relatively slight, the Court cannot discount the mental anguish associated with the experience of almost dying of carbon monoxide poisoning in one's sleep. [35] However, after carefully reviewing the evidence, we conclude that the compensatory damages awards are excessive. Therefore, we order the following remittiturs.

First, we order a remittitur of the $750,000 in compensatory damages awarded to Ruth McCord. The record contains no credible evidence of any injury for which she may have been entitled to damages. Ruth McCord was not present on the evening that her daughter and granddaughters were poisoned, and she did not appear and testify at trial. The plaintiffs simply did not introduce at trial any evidence as to any legally compensable injury she may have suffered, other than to support an award of nominal damages. In light of these considerations, we remit the jury's award of $750,000 in compensatory damages to Ruth McCord to $1.00.[6]

Second, we order a remittitur with regard to the $750,000 in compensatory damages awarded to Janice Simpson. Although Janice suffered from acute carbon monoxide poisoning, her hospital costs amounted to only $1,962, and Dr. Johnson could not specify any long-term effect from the poisoning. Janice testified that she was doing fine physically, had no health problems, and was doing well in school. In light of this evidence, we remit the $750,000 in compensatory damages to $100,000.

Third, we order a remittitur with regard to the $2,000,000 in compensatory damages awarded to Felicia Simpson. Like the others [36] who were in the mobile home, Felicia suffered from acute carbon monoxide poisoning. However, her hospital costs were only $1,202, and

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[6] We note that Ruth McCord had received $142,500 in a pretrial settlement with several other defendants, who were dismissed before trial.

the only long-term symptom to which she testified was blurred vision. Dr. Johnson testified that blurred vision was a long-term symptom of carbon monoxide poisoning and that when he examined Felicia, she reported blurred vision in her right eye. However, Dr. Johnson was not certain that carbon monoxide was the cause of Felicia's blurred vision. In light of this evidence, we remit the $2,000,000 award in compensatory damages to $250,000.

Fourth, we order a remittitur with regard to the $2,000,000 in compensatory damages awarded to Louisiana Waddell. As with the other plaintiffs sleeping in the mobile home on the evening of the accident, Louisiana suffered acute carbon monoxide poisoning, which, because of her age and her existing health problems, had lasting effects. The evidence showed that Louisiana incurred approximately $10,000 in hospital expenses and that she suffered from long-term effects of carbon monoxide poisoning. According to Dr. Johnson, the carbon monoxide poisoning aggravated the hypertension for which she had received treatment before the accident. Louisiana complained of continuous headaches, dizziness, nausea, and shortness of breath, which restricted her movement. In light of this evidence, we remit the $2,000,000 award of compensatory damages to $500,000.

We now turn our attention to the $2,500,000 in punitive damages awarded in the three personal injury claims and the [37] $4,000,000 in wrongful death damages. The considerations that inform our analysis of the defendants' contention that the punitive damages awards are excessive differ somewhat from those that guided our analysis of the compensatory damages awards. When excessiveness of punitive damages is the issue, the focus of our review is not on the plaintiff's injuries, but, rather, is on the reprehensibility of the defendant's conduct. *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1063 (Ala. 1992). In compliance with the procedures mandated by *Hammond* and *Green Oil*, the inquiry is whether the amount of pu-

nitive damages awarded exceeds the amount necessary to accomplish society's goals of punishment and deterrence. *Green Oil,* 539 So.2d at 218.

After thoroughly reviewing the evidence in this case, we conclude that the punitive damages awards were not excessive. Sears and State Industries specifically designed the Kenmore II gas water heaters to allow users to install them themselves. By so marketing the Kenmore II, the defendants came under a legal duty to anticipate reasonably foreseeable ways in which consumers would misinstall their product and injure themselves and to change its design to eliminate the risks associated with such misuses or to adequately warn consumers of those risks. The plaintiffs convincingly showed that, even though the defendants were clearly aware that some consumers were misinstalling their gas water heaters and suffering death or serious injuries, they did nothing to alter the design or labelling of their product. Therefore, in [38] light of the reprehensibility of Sears and State Industries' wanton conduct and the extreme risk of injury or death that conduct created, we cannot say that the punitive damages awards were excessive.

Moreover, we note that the amount of the punitive damages awarded in this case is not inconsistent with the amounts of other punitive damages awards affirmed by this Court. E.g., *Atkins v. Lea,* 603 So. 2d 937 (Ala. 1992) ($6,875,000 wrongful death award affirmed); *General Motors Corp. v. Johnson,* 592 So. 2d 1054 (Ala. 1992) (judgment affirmed, conditioned on remittitur of $7,500,000 of jury's $15,000,000 wrongful death award); *Industrial Chem. & Fiberglass Corp. v. Chandler,* 547 So. 2d 812 (Ala. 1988) ($5,000,000 punitive damages award affirmed).

Based on the foregoing, the judgment is therefore affirmed, conditioned upon remittitur, as indicated above. The plaintiffs shall, within 30 days after the date of this opinion, file a remittitur, pursurant [sic] to § 12-22-71, Ala.

Code 1975, reducing the total judgment as ordered herein; otherwise, this judgmdent [sic] will stand reversed and the cause remanded for a new trial.

AFFIRMED CONDITIONALLY.

Hornsby, C.J.,* and Maddox, Shores, Adams, Steagall, and Ingram, JJ., concur.

Houston, Jr., dissents in part, concurs in part conditionally to affirm.

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[39] *Although Chief Justice Hornsby did not sit at oral argument, he has studied the record and listened to the tapes of oral argument.

[40] Sears, Roebuck v. Annie Harris, administratrix, etc.

HOUSTON, JUSTICE (dissenting in part; concurring in part conditionally to affirm).

I write only to express my concern about the inconsistent punitive damages verdicts.

Sears and State Industries were punished to the extent of $4,000,000 for the single act or omission giving rise to liability on the claim of Ms. Harris for the death of Joyce Simpson. *For this same act or omission giving rise to liability*, Sears and State Industries were punished by an award of $1,000,000 on the claim of Felicia Diane Simpson and by an award of $1,000,000 on the claim of Louisiana Waddell; and to further complicate this matter, *for this same act or omission giving rise to liability*, Sears and State Industries were punished by an award of only $250,000 on the claim of Janice Denise Simpson and by an award of only $250,000 on the claim of Ruth McCord. The same act or omission giving rise to liability occurred in each case.

The following is the entire jury charge as it relates to punitive damages:

> "You take the law as the Court gives it to you and apply it to the facts as you determine them to be in arriving at your verdict. . . .
>
> "All of those claims [five different claims] are made on the grounds that the defendants . . . were negligent *or* wanton in their conduct. . . .
>
> ". . . [T]he plaintiffs also complained that . . . the defendants acted wantonly.
>
> "[The court defined wantonness and willfulness.] [41]
>
> ". . . Ms. Harris has a claim . . . under the wrongful death act for the wrongful death of

Joyce and the law says that in a suit brought for wrongful acts, omission, or negligence causing the death or damages recoverable [sic]. Damages recoverable are punitive not compensatory.

"Damages in this type action are entirely punitive imposed for the preservation of human life and as a deterrent to others to prevent similar wrong. The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant.

"In assessing damages you are not to consider the monetary value of the deceased. For damages of this type of action are not recoverable to compensate the family for the—of the deceased from a monetary standpoint on account of her death nor to compensate the plaintiff for any financial loss sustained by her for the family of the deceased on account of the death.

"Your verdict . . . should be directly related to the culpability of the defendants and necessity for preventing similar wrong in the future.

". . . .

"Punitive damages are allowed to the plaintiff and may be awarded in the sound discretion of the jury in cases where the plaintiff reasonably satisfies the jury from the evidence that the plaintiff has been willful [sic] or wantonly injured by the defendant.

". . . .

"Now, so far as the matter of punitive damages is concerned, punitive damages, as you will recall I told you, could be awarded in your discretion where you find that the Defendants have been guilty of wanton conduct or in a wrongful death case.

"And the law says the matter of punitive damages is set out in the Code of Alabama in Section 6-11-20 and in its pertinent parts it reads as follows:

> " 'Punitive damages may not be awarded in any civil action except actions for wrongful death other than tort actions where it is proven by clear and convincing evidence that the Defendant consciously or deliberately [42] engaged in oppression, wantonness or malice with regard to the Plaintiff.'

"Now, as it is used in that statement wantonness is conduct which is carried on in a reckless or conscious disregard for the rights of others.

"The right to punitive damages must be . . . shown by clear and convincing evidence. Evidence that would—clear and convincing evidence that would weigh against—when weighed against evidence in opposition would produce in the minds of the trier of the facts a firm conviction as to the essential elements of the claim and a high probability as to the correctness of the conclusions.

"Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or substantial weight of the evidence, but less than beyond a reasonable doubt.

"You take that into consideration when—if you determine . . . that the plaintiff is entitled to punitive damages."

I will assume that the jury did not find clear and convincing evidence of wantonness or willfulness to support a punitive damages award of $4,000,000 for Janice Denise Simpson, Ruth McCord, Louisiana Waddell, and Felicia

Diane Simpson's claims, but did find substantial evidence of negligence, wantonness, or willfulness to support an award of $4,000,000 in punitive damages in the wrongful death case. Punitive damages "should not exceed an amount that will accomplish society's goal of punishment and deterrence" in wrongful death cases. *General Motors Corp. v. Johnston*, 592 So.2d 1054, 1063 (Ala. 1992). Alabama's wrongful death statute (or this Court's interpretation of it, which has thus far escaped legislative correction) is "a riddle wrapped in a mystery inside an [43] enigma."[7] I have no standard by which to determine whether a wrongful death award is excessive or inadequate.[8] It is not excessive or inadequate if five members of this Court hold that it is not excessive or inadequate; it is excessive or inadequate if five members of this Court hold that it is excessive or inadequate. At least five other members of this Court hold that the award in this wrongful death case is not excessive; therefore, I concur.

However, the punitive damages verdicts that a single jury returned for Felicia Diane Simpson, Louisiana Waddell, Janice Denise Simpson, and Ruth McCord are inconsistent verdicts, because they were all supposed to be based on the same standard: clear and convincing evidence of "culpbability of the defendants and necessity for preventing similar wrong in the future." Punitive damages *qua* punitive damages also must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Wilson v. Dukona Corp.*, 547 So.2d 70 (Ala. 1989). The $1,000,000 punitive awards as to Felicia Diane Simp-

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[7] Winston Churchill, radio broadcast, October 1, 1939 (referring to the Soviet Union).

[8] This Court has recently affirmed an award of $500 in a wrongful death case in which the act or omission that the jury found proximately caused the death was no less culpable than the act or omission of Sears and State Industries in the case at issue. *Ross v. Rogers*, [Ms. 1920032, August 27, 1993] ___ So.2d ___ (Ala. 1993).

son and Louisiana Waddell exceeded society's goal of punishment and deterrence by $750,000 each, for the same jury set society's goal of punishment and deterrence for the same act or omission giving rise to liability at $250,000 as to [44] Janice Denise Simpson and Ruth McCord. Therefore, the verdicts are inconsistent. Rather than reverse and remand for a new trial, I would affirm the judgment, conditioned upon remittitur of $750,000 of the punitive damages awards to Felicia Diane Simpson and Louisiana Waddell, so that the punitive damage awards to each plaintiff other than Ms. Harris, as administratrix, is $250,000.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

Supreme Court No. 1911519

SEARS, ROEBUCK and CO. and STATE INDUSTRIES, INC.

Appellants,

vs.

ANNIE HARRIS, et al.

Appellees.

ON APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY, ALABAMA CIVIL ACTION NO.: CV 90-35

APPELLANTS' BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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ORAL ARGUMENT IS REQUESTED

* * *

II. THE COURT ERRED IN FINDING THAT THE DEFENDANTS HAD WAIVED CONSTITUTIONAL ARGUMENTS BECAUSE THE TRIAL JUDGE USED STATUTORILY REQUIRED VERDICT FORMS.

This Court incorrectly held that Defendants waived constitutional error on substantive due process grounds regarding punitive damages. This incorrect holding was based on the unsupported statement that the "Defendants . . . requested special verdict forms, of their own drafting. . . ." (Opinion at 33) As stressed in Defendants' Appeal Briefs and Application for Rehearing, the constitutional challenges are to the judgment entered in this case, *not* the verdict forms. Moveover, this Court's factual conclusion concerning the verdict forms is incorrect.

The Defendants did not prepare or request the verdict forms submitted to the jury. There is no support for the [8] Plaintiffs' misstatements in their Brief to that effect nor the Court's misplaced reliance on same.

The Plaintiffs cited one page in the Record to support their contention that Defendants drafted the verdict forms—page 937 of the Clerk's Record. A review of that page, however, shows that no verdict forms of *these* Defendants are on that page or any following page. What the Record *does show* is that the trial court instructed the jury on *statutorily required verdict forms that it stated the court had prepared.*[4] (R. at 1253) (emphasis added) What the Record also shows is that the caption style, using "******," and a typing font used on the returned verdict forms are identical to the caption style and typing font used in every single pleading filed by the Plaintiffs in this case. A comparison of Plaintiffs' pleadings filed throughout this case with the actual verdict forms (located at C. 1116-

[4] Ala. Code § 6-11-1 (1975) dictates the verdict forms used in the instant case.

20) confirms this.[5] Once again, the Record does not support the Plaintiffs' erroneous claim, nor [9] this Court's subsequent ruling, that these Defendants requested or drafted the verdict forms submitted to the jury.

Even if Defendants had offered these forms, such is not an invitation for the jury to award punitive damages or to award them in differing amounts for the same act. Furthermore, there is no legal support for concluding that the submission of a statutorily required verdict form results in a waiver of a constitutional challenge to punitive damages.

The constitutional challenges made by the Defendants are not to the procedural use of the verdict forms, even had Defendants prepared the statutory forms. Rather, the Defendants challenge the violation of their Fourteenth Amendment constitutional rights by the judgment of different punitive awards for the same act. It is the *judgment* which gives rise to Defendants' constitutional challenges, not the particular jury forms used.[6]

This Court has *previously* held that in order to preserve a constitutional issue for appeal, the matter must simply be raised at the trial court level, to give the trial judge an opportunity to rule on the issue. *Alabama Power Co.*

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[5] The following cites to the Record will provide the Court with a sample of the pleadings filed by the Plaintiffs throughout this case, beginning with Plaintiffs' Complaints at C. 7-8, 136, 246, 288, and 310. Other examples of Plaintiffs' pleadings are located at C. 414, 440, 707, 954, and 1177. Compare the caption style and typing font of the Plaintiffs' pleadings, which are identical to those on the returned verdict forms, to the caption style and typing font used in these Defendants' pleadings. Samples of these Defendants' pleadings are found at C. at 426, 430, 435, 796, 842, 854, 856, 858, 1121, and 1146.

[6] The constitutional deficiencies in the judgment argued here were specifically challenged in paragraphs 49(f), (j), and (k), and 50 and 54 of defendants' Post-Judgment Motions, and specifically addressed and overruled at pp. 19-20 of the Order denying defendants' Post-Judgment Motions. (C. 1146-1168, 1196-1216)

v. Turner, 575 So. 2d 551 (Ala. 1991); *Ex Parte State Dept. of Revenue*, 595 So. 2d 472 (Ala. 1991). Here, the issue was [10] preserved for appellate review by the arguments presented and the trial court's decision thereon. In fact, the trial court makes specific mention of the constitutional challenges in its written Order denying Defendants' post-judgment motions, where these challenges were denied on their *merits*. (C. at 1214-15) In addition to the post-judgment motions and the trial court's Order, the Record also shows that the court below was presented with the Defendants' due process claims as they regard punitive damages during the course of the litigation. (C. at 96-98, 798)

This Court's Opinion holding that the Defendants waived their constitutional challenges to punitive damages due to the submission of statutorily required verdict forms is not supported factually in the Record or by the applicable law of waiver. Your movants pray that the Court rehear its decision in these regards.

III. THIS COURT'S OPINION AFFIRMING PUNITIVE DAMAGE AWARDS IN DIFFERENT AMOUNTS FOR DIFFERENT PLAINTIFFS, ALL CHALLENGING THE SAME OPERATIVE SET OF FACTS BY THESE DEFENDANTS, CONSTITUTES A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE FOURTEENTH AMENDMENT AND IS IN CONTRADICTION OF THE FRAMEWORK OF CHECKS AND BALANCES APPROVED BY THE U.S. SUPREME COURT. *PACIFIC MUTUAL LIFE INS. CO. V. HASLIP*, 499 U.S. 1, 111 S. CT. 1032 (1991).

As shown above, there has been no factual or legal waiver by these Defendants of the constitutional challenges they have [11] proposed.[7] Moreover, in this Application for

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[7] Defendants' constitutional challenges and supporting argument have been thoroughly stated and briefed in Defendants' Appeal Brief pages 129-43 and Defendants adopt and incorporate same as if fully set out

Rehearing, these Defendants raise the constitutional error of *this* Court's failure to independently evaluate the five separate punitive awards below awarded for the same act against the same Defendants. Those differing judgments of "punishment and deterrence" for the same set of facts constitute a denial of due process to these Defendants. And, this Court's failure to exercise its independent evaluation and review of those judgments removes a significant ingredient required by this state's system of checks and balances in reviewing punitive awards.

The multiple and inconsistent punitive damage awards approved by this Court for the same action are as follows:

Annie Harris, as administratrix of the estate of Joyce Simpson	$4,000,000
Felicia Simpson	$1,000,000
Janice Simpson	$ 250,000
Louisiana Waddell	$1,000,000
Ruth McCord	$ 250,000

(C. at 1124-25)

This Court has consistently held that punitive damages should not exceed an amount that will accomplish society's [12] goals of punishment and deterrence. *Wilson v. Dukona*, 547 So. 2d 70 (Ala. 1989). In its sole discretion, a jury in Alabama is given the authority to determine an amount of punitive damages sufficient to accomplish the societal goals of punishment and deterrence. No aspect of these damages need correlate with specific compensatory claims. Rather, punitive awards are tied to the societal goals of preventing similar injuries by similar acts in the

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herein. Of particular relevance are Judge Sarokin's comments in *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053 (D.N.J. 1989), *vacated in part on other grounds*, 718 F. Supp. 1233 (D.N.J. 1989), set out on pages 136-37 of Defendants' Appeal Brief.

future as well as to punish willful and egregious wrongs. Yet, the discretion of the jury in these matters must necessarily be subjected to substantial safeguards by the reviewing judge and the Appellate Court in order to meet appropriate due process and equal protection requirements.

Even before the review by the U.S. Supreme Court of the Alabama system, this Court recognized that it had an independent duty in its appellate role to determine whether punitive awards are excessive in amount. *Burlington North Railroad Co. v. Whitt*, 575 So. 2d 1011 (Ala. 1990).

In *Whitt*, the Court held that a review of the award of punitive damages by the trial court using the *Hammond* guidelines (referring to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986)) did not relieve this Court of making an independent evaluation of whether the award was excessive. Specifically, the Court stated:

> The trial court has followed the *Hammond* guidelines and has found no reason to interfere with the verdict of the jury. [13]
>
> However, that does not relieve this Court of its responsibility to consider whether the award is excessive. *As the only appellate court with the ability to assure some degree of uniformity in the area of punitive awards, we must also determine whether the award is excessive when compared to awards in similar cases. Whitt* at 1024. (emphasis added)

It was this system of checks and reviews which was approved by the U.S. Supreme Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 111 S. Ct. 1032 (1991). In *Haslip*, the Court held that, where the Alabama Supreme Court reviews punitive damage awards by applying a comparative analysis and detailed substantive standards, due process has been provided. In the instant case, the Court did not perform the required review and,

consequently, the Defendants' rights to due process and equal protection have been denied.

This Court's review of the judgment entered below discusses the punitive awards as if they constitute a single award of $6,500,000.00. In fact, as shown above, this amount is an accumulation of five separate awards. Nevertheless, from this flawed basis, this Court undertook to make its *Hammond* review. No discussion is made in that review that the five separate awards range from $250,000.00 to $4,000,000.00—all for the same acts against the same Defendants.

Under *Whitt, supra*, this Court is required to make an independent determination in order to ensure "some degree of uniformity in the area of punitive damages." This review, as applied to the case at bar, would require comparing the five separate awards given by the jury below to "similar cases." [14] Ironically, the difficulty in finding factually and legally similar cases is alleviated since all five of these verdicts were adjudicated against the same Defendants for the same acts by the same jury hearing the same evidence. An exercise by this Court of its "comparative analysis" would necessarily conclude that at least three of the awards are excessive "when compared to awards in similar cases." *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988).

If the jury below found that $250,000.00 was the appropriate amount to punish these Defendants for the alleged wrongful conduct, any amounts awarded beyond that for the same conduct under the same set of facts would necessarily be excessive.[8] This is exactly the reason that

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[8] Defendants' assertion that the punitive damages awarded are excessive and inconsistent is thoroughly briefed and argued on page 149-64 of Defendants' Appeal Brief and Defendants adopt and incorporate same as if fully set out herein.

the Alabama Supreme Court recognized in *Whitt* the requirement of reviewing punitive awards—to control the award of inconsistent amounts for similar wrongs. If these inconsistent awards are treated as a cumulative sum for purposes of appellate review, the entire purpose of this due process safeguard has been discarded. Likewise, the system approved by the U.S. Supreme Court in *Haslip* has been substantially altered if such an approach is used. The logical result of this absence of [15] safeguards will be to subject these and other Defendants to the unchecked, unbridled discretion of the jury.

The importance of these reviews cannot be overlooked. As recently as June of this year the U.S. Supreme Court again reiterated through Justice Sandra Day O'Connor the importance of this postverdict review exercise by the Alabama Supreme Court. In *TXO Production Corp. v. Reliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711 (1993), Justice O'Connor, dissenting on other grounds, discussed the U.S. Supreme Court's holding in *Haslip* and how the Court was:

> Reassured by the fact that Alabama courts subject punitive verdicts to exacting postverdict review at two different levels. . . . [T]he Alabama Supreme Court itself provides an additional "check" by conducting comparative analysis and applying *detailed substantive standards* . . . thereby 'ensur[ing] that the award does not exceed an amount that will accomplish society's goals of punishment and deterrence.' (citations omitted) 113 S. Ct. at 2740. (emphasis added)

Justice O'Connor also noted that:

> [S]tate courts must do more than recite the constitutional rule. They must also apply it, faithful to the letter and cognizant of the principles underlying it. Unfortunately, such review is not always forthcoming. 113 S. Ct. at 2742.

The Defendants in this Application for Rehearing simply ask that this Court be "faithful to the letter and cognizant of the principles" underlying its previous decision in *Whitt*, as well as the Supreme Court's guidance provided by *Haslip*.

This Court has before it five varying awards of punitive damages for a single act by the same Defendants, all resulting [**16**] from the same trial. The inconsistency of these amounts, unless checked by this Court, will constitute a substantial denial to these Defendants of due process and equal protection. The purposes of punishment and deterrence are not served by such inconsistency. Furthermore, misguided awards of this nature provide ample evidence that the deliberative process of the jury failed to grasp the purpose of punitive damages as explained by the trial judge. Morally, societal goals cannot be achieved by unbridled discretion. Legally, such awards cannot be countenanced under the prior decisions of this Court or the Constitution of this nation.

This Court has simply failed to properly review the verdicts below as five separate verdicts all awarding punitive damages in differing amounts for the same act by these same Defendants. This Court's responsibility in that regard is an essential safeguard, if punitive damage awards are to be constitutionally permitted. This Court's Opinion on this issue should be reheard.

* * *

APPENDIX C

IN THE CIRCUIT COURT FOR LOWNDES COUNTY, ALABAMA

CASE NO. CV-90-35

ANNIE HARRIS, et al.,

Plaintiffs,

vs.

SEARS, ROEBUCK & COMPANY, et al.,

Defendants.

FILED

MAY 13 1992

CIRCUIT CLERK

ORDER DENYING DEFENDANTS' POST-JUDGMENT MOTIONS

This case was tried before the undersigned Circuit Judge with a jury. At the close of all testimony, Defendants made a motion for a directed verdict contending that the Plaintiffs had not proven their claims. The Court heard arguments on these motions, was of the opinion that the motions were due to be denied, and entered an Order denying each motion. The case was then submitted to the jury. The jury subsequently found in favor of the Plaintiffs and against both Defendants and assessed damages as follows: [2]

Plaintiff	Compensatory Damages	Punitive Damages
Annie Harris, as mother of Joyce Simpson, deceased	-0-	$4,000,000
Annie Harris, as next friend of Felicia Diane Simpson	$2,000,000	$1,000,000
Louisiana Waddell	$2,000,000	$1,000,000
Annie Harris, as next friend of Janice Denise Simpson	$ 750,000	$ 250,000
Ruth McCord	$ 750,000	$ 250,000

Defendants filed timely post-trial motions which consisted of motions for judgment notwithstanding the verdict, for a new trial, or in the alternative, for remittitur. In connection with their motions, Defendants contend that there was insufficient evidence to submit the case to the jury setting out numerous grounds for the motions. Defendants also claim that the damages awarded, both compensatory and punitive, were excessive. Defendants raised numerous other grounds they contend justify a new trial.

A hearing was held on these motions on May 6, 1992. For the reasons stated below, the Court is of the opinion that all of the Defendants' several motions are due to be denied.

I. MOTION FOR JNOV

In order to support their claims which were submitted under the Alabama Extended Manufacturing Liability Doctrine (AEMLD), Plaintiffs were required to prove the following elements: [3]

1. That Defendants manufactured, sold, or distributed the gas water heater in question;

2. That Defendants were ordinarily engaged in the manufacture, distribution, or sale of such products;

3. That the water heater was defective;

4. That the water heater reached Mrs. McCord, the ultimate consumer, without substantial change in the condition in which it was manufactured; and

5. That the defect in the product was the proximate cause of the death and injuries complained of. *Casrell v. Altec Industries, Inc.*, 335 So.2d 128 (Ala. 1976); *Atkins v. American Motors Corporation*, 335 So.2d 134 (Ala. 1976).

There is no dispute that State Industries manufactured the subject water heater and that State Industries was ordinarily engaged in the manufacture and sale of such products. There is also no dispute that Sears sold or distributed the subject water heater and that the water heater subsequently was purchased by Mrs. McCord for use in her mobile home.

It is well settled that the term "defective" means unreasonably dangerous. *Casrell v. Altec Industries, Inc., Supra.* In *Casrell,* the Court defined the term "defective" to mean that the product does not meet the reasonable expectations of an ordinary consumer as to its safety. The Court will now discuss what it considers to be the major thrust of Defendants' contentions. [4]

A. Misuse of Product

Defendants claim that the subject water heater was misused in that it was installed in a manner inconsistent to instructions noted in the owners manual (which was not with the heater) and that the water heater was installed in a manner that failed to comply with the regulations of

the Alabama Liquified Petroleum Gas Board. In response, Plaintiffs contend that if this was misuse, it was "reasonably foreseeable" by Defendants and that the misuse defense is therefore inapplicable.

There was evidence at trial to the effect that Defendants were well aware that over the years consumers had used gas water heaters in a manner consistent with the installation by Dexter McCord of this heater and that persons had been killed as a result. It was undisputed that carbon monoxide poisoning has been a known danger with gas water heaters in homes for years and that Defendants were well aware of the dangers and hazards created thereby. There was evidence to the effect that Defendants, by statements printed by State Industries on the water heater itself, encouraged private installation by persons who were untrained and lacked knowledge concerning proper installation procedures. There was direct evidence that Defendants themselves had been involved in a products liability suit under similar circumstances prior to the sale of the subject water heater to Mrs. McCord. There was evidence that Defendants had knowledge that ordinary, untrained people would install the gas water heaters themselves; that most people do not know the difference in LP gas and natural gas (such as here); that [5] hooking up a natural gas heater to LP Gas was highly dangerous; and that people would likely be killed as a result of carbon monoxide poisoning caused by such installation. Under the facts of this case, there clearly was no misuse of the product as a matter of law, contrary to the claims of Defendants. It is equally clear that the manner of installation in this case was readily foreseeable to Defendants as were the known dangers associated with such installation.

The testimony was to the effect that Defendants were aware that improper installation was likely to occur, would pose a definite hazard, and would thereby create an extremely dangerous situation. It was known that gas water

heaters of this sort would be used in homes and in mobile homes.

The Plaintiffs produced substantial evidence that the subject water heater was, in fact, defective.

B. Alteration of the Product

Defendants contend that the subject water heater was substantially altered between the date of the sale and the date on which Mrs. Waddell and the three minor children were poisoned by carbon monoxide gas. It is suggested by Defendants that the alleged alterations were all significant and substantial alterations of the subject water heater as a matter of law. Under the case law in this state, a manufacturer remains liable if an alteration or change in the product is "foreseeable." *Clarke Industries, Inc. v. Home Indemnity Company,* 591 So.2d 458 [6] (Ala. 1991). The evidence in this case clearly reflects that the owners manual was not attached to the water heater in a permanent manner which is a violation of American National Standards Institute regulations. It was reasonably foreseeable to the Defendants, based upon evidence in the case, that the owners manual would not remain attached to a water heater in a permanent manner. Defendants did little to make the owners manual a permanent attachment to the water heater. In fact, it was not.

The changes or modifications that Defendants complain of should have been anticipated based upon the testimony at trial. It was for the jury to determine if these matters rose to the level of a substantial alteration of the product. They did not which was obvious by the verdict. Even if it did, the alteration or change was foreseeable by Defendants. [7]

The manufacturer of a product remains liable if alteration or change in the product is foreseeable. *Clark Industries, Inc. v. Home Indemnity Company,* 591 So.2d 458, 462 (Ala. 1991). The evidence was that the Defendants

were aware of any misuse of the product that could be attributed to Dexter McCord, the installer of the subject water heater, in this case.

The jury could have easily concluded from the evidence that the other changes were either insubstantial, or that these changes had no bearing on the outcome, or that such changes were foreseeable by Defendants.

C. Inadequacy of Warnings

The Defendants also contend that Dexter McCord, the installer of the subject water heater, would not have read instructions had they been provided, either in the manual or on the product. The jury could have reasonably concluded that the warnings furnished originally with the water heater and the limited warnings that were present on the product were inadequate. The Plaintiffs' expert testified that the warnings issued by Defendants were inadequate. The Defendants' expert appeared to agree with this assessment on cross-examination by Plaintiffs' lawyers. In fact, he went further on this point in certain critical aspects enhancing Plaintiffs' position on the adequacy of warnings. The jury could have reasonably concluded that if the proper warnings had been placed on the machine itself, that Dexter McCord would have certainly read and responded to such warnings. Nothing contained in warnings issued by Defendants would have alerted Dexter McCord, or any other ordinary consumer, to the fact that death could result from carbon monoxide poisoning if a natural gas water heater was hooked up to an LP gas line. The jury could have reasonably concluded from the evidence that the Defendants' warnings in this case were inadequate and lacking in several respects. *Clarke Industries, Inc. v. Home Indemnity Company, Supra.* The warnings in this case were not of a permanent nature and were likely to be lost after the manufacture and delivery of the heater.

In view of the dangerous propensities of the subject water heater, the seriousness of a potential hazard to life and health, [8] the standards for warnings within the industry, the experts' testimony, and the methods available to Defendants to communicate such a warning, the jury could have reasonably concluded that there was substantial evidence that Defendants failed to take reasonable steps to provide an adequate warning to consumers. *Clarke Industries, Inc. v. Home Indemnity Company, Supra.*

D. Other Possible Causation

The Court finds that the jury could have reasonably concluded from the evidence that the gas water heater was lighted, in use, and was the proximate cause of the death and bodily injuries involved. This was the finding of the State official who investigated the incident and who so-stated in his report. Other evidence proved that the gas had to be on on the night in question.

E. Safety Devices

The evidence was to the effect that the Defendants had actual notice of the dangerous propensities of gas water heaters insofar as carbon monoxide poisoning is concerned. It was clear from the evidence that Interstate Industries made a corporation decision not to utilize safety devices which were available for use and which could have made the product safer for use by consumers. All experts who testified acknowledged that safety devices were available and could have been used by Defendants for the subject water heater. The Court notes that State Industries apparently has led the fight nationwide to keep the gas water heater industry from [9] utilizing these safety devices. This is conduct which cannot be condoned.

F. Conclusion

The Plaintiffs produced substantial evidence that the subject water heater was defective and that the defect proximately caused the death and injuries involved in this

case. The Court further finds that the jury could have reasonably concluded from the evidence that the Defendants were each liable under the Alabama Extended Manufacturers Liability Doctrine. A defective gas water heater was manufactured and distributed. Additionally, there was a failure to adequately warn ultimate consumers of the known dangers associated with the foreseeable use of water heaters of this sort.

II. MOTION FOR NEW TRIAL

Defendants raised numerous grounds in support of their motions for a new trial which covered a broad spectrum of trial activity. The Court is of the opinion that none of these grounds has substantial merit. The Court sees no reason to discuss each ground except to note that Defendants received a fair and impartial trial. There is no ruling on the introduction of evidence that warrants attention here. The Court believes and finds that each ruling was absolutely correct.

The Court finds no merit in any of the Defendants contentions insofar as the motions for a new trial are concerned. The [10] Defendants' motions for a new trial are due to be denied.

III. REMITTITUR

A. Compensatory Damages

Jury verdicts are presumed to be correct and whether an award of compensatory damages in a personal injury case is deemed to be excessive depends directly upon the facts of that case. *Pepsi-Cola Bottling Company v. Allen,* 572 So.2d 434, 436 (Ala. 1990). As the Alabama Supreme Court has correctly stated, there is no fixed standard for the ascertainment of compensatory damages recoverable for physical pain and mental suffering which is a major element in this case. The amount of such awards is left to the sound discretion of the jury subject only to correction by the trial court for clear abuse or the product of

bias, passion, or prejudice. The Court finds the evidence to be more than adequate to support the jury's verdicts as to compensatory damages.

Plaintiffs presented medical testimony which was undisputed as to the injuries and damages suffered by the bodily injury Plaintiffs. The Court cannot see where the verdict as to either of these Plaintiffs was the product of either bias, passion, or prejudice. The amounts of the verdicts, under the facts of this case, do not shock the judicial conscience of this Court.

There was substantial evidence by which the jury could have found that Mrs. Waddell, Felicia Diane Simpson, and Janice Denise Simpson, in addition to their physical injuries, suffered severe mental pain and anguish. Each of these Plaintiffs has residual [11] physiological effects from the carbon monoxide poisoning. There was undisputed medical testimony that some of their problems are permanent in nature and caused by the carbon monoxide poisoning. There was evidence that Mrs. McCord suffered mental pain and anguish. There is nothing to indicate from the evidence in this case that the compensatory damages awarded to these Plaintiffs were so great as to indicate that the verdicts were a product of bias, passion, or prejudice. The awards appear to have been a well-reasoned decision of a jury that reflects the relative degree of injury among the bodily injury Plaintiffs. Each verdict must stand on its own and can certainly be justified from the evidence.

B. Punitive Damages

The presumption of correctness that covered the award of compensatory damages by the jury also applies to the award of punitive damages. *Green Oil Company v. Hornsby,* 539 So.2d 218, 221 (Ala. 1989). The Alabama Supreme Court has recently affirmed this principle in *Shoals Ford, Inc. v. Clardy,* 588 So.2d 879 (Ala. 1991).

Defendants have requested the Court to reduce the non-death punitive damages to $250,000 where applicable as

to certain Plaintiffs pursuant to *Alabama Code*, § 6-11-21. These are questions as to the constitutionality of this statute. Even if this statute is deemed to be constitutional by the Alabama Supreme Court, the Court finds that the Plaintiffs met the wantonness exception to this limitation. The section allows punitive damages to exceed $250,000 if there was evidence of wanton conduct on the part of the [12] Defendants. It is for the jury to determine whether the Defendants' conduct was committed willfully, wantonly, or intentionally insofar as punitive damages are concerned. *Shoals Ford, Inc. v. Clardy, Supra.*

The evidence in this case supports Plaintiffs' contentions that the Defendants were guilty of wanton conduct due to their actual knowledge and conscious effort not to utilize available safety devices that would have made the subject water heater and other water heaters safer for use by consumers. The corporate representative, who testified as an adverse witness, called by Plaintiffs, acknowledged that:

(1) Some 200-300 persons have been killed each year as a result of carbon monoxide poisoning from gas appliances;

(2) A substantial number of these deaths involve gas water heaters;

(3) The manufacturer of gas water heaters have a responsibility to anticipate hazards and either design out the hazards or at least warn the consuming public of the dangers;

(4) The employee of State Industries who actually designed this heater, actively fought the proposed ANSI Standards that would have required available safety devices to be used with gas water heaters;

(5) Defendants knew that the gas water heaters were being frequently installed improperly by persons who were untrained and lacked knowledge of

dangers known to [13] Defendants and others in the industry;

(6) That Defendants encouraged consumers to install the gas water heaters themselves;

(7) That average people do not know the difference between LP gas and natural gas;

(8) That consumers have over the years improperly hooked natural gas heaters to LP gas lines;

(9) That such installation would always result in the production of carbon monoxide gas;

(10) That such conditions would cause substantial hazard dangers to consumers; and

(11) That death or serious bodily injury was likely to occur.

Plaintiffs produced a highly qualified expert who testified that this gas water heater was defective and that the Defendants' warnings were grossly inadequate.

The jury could certainly have concluded that Defendants' expert witness agreed with much of Mr. McCain's (the Plaintiffs' expert) testimony. Accordingly, the Court concludes that the Plaintiffs established their burden of proving at least wantonness on the part of the Defendants. *Shoals Ford, Inc. v. Clardy, Supra.* Certainly, the Defendants acted with a reckless and conscious disregard of the rights and safety of consumers who would purchase their heaters. The evidence was clear and convincing on this point.

The Court will now review the issue of punitive damages pursuant to the directions of the Alabama Supreme Court as outlined [14] in *Green Oil Company v. Hornsby, Supra* and *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

(1) The Degree of Reprehensibility of Defendants' Conduct

The evidence in this case indicates that Defendants were aware that large numbers of persons were being killed as a result of carbon monoxide poisoning caused by gas water heaters. Defendants were equally aware of the availability of safety devices to be used with gas water heaters. The Defendants made a conscious decision at the highest corporate level not to utilize these safety devices. The Defendants knew or reasonably should have known that, as a result of their conduct or failure to act, persons would likely be killed or badly injured. A key employee of State Industries actually served on an industry-wide safety committee and has actively fought the requiring of available safety devices on gas water heaters for over twenty years.

The evidence showed that the Defendants were aware of the particular hazard involved in this case prior to placing the subject water heater on the market. The jury could have found from the evidence that the Defendants concealed the dangers and hazards from the public and did not notify any of the purchasers, or prospective purchasers, of the problems related to water heaters insofar as carbon monoxide poisoning is concerned.

The jury could have concluded that the Defendants made a business judgment to risk damage to persons from the defect in the water heater rather than to expend the sums of money necessary [15] to either design out the problem or warn of the hazards. This is not a case where the death and bodily injuries occurred as a result of mere inadvertence, nor even where wanton conduct occurred on a single occasion. Here, the Defendants placed hundreds of thousands of their customers' lives at risk in order to save money and increase profits. In this Court's opinion, the wrongdoing of Defendants was intentional or, at the very least, wanton, and intolerable in our society.

In considering the degree of reprehensibility of the Defendants' conduct, this Court considers the duration of the conduct, the degree of the Defendants' awareness of the hazard which the conduct caused or is likely to cause, and any concealment or cover-up of that hazard. The Court is convinced that the Defendants were aware that the risk to consumers was great and that the Defendants made a decision to run the risk.

Accordingly, the Court finds that the degree of reprehensibility of Defendants in this case is great and that the damages are not excessive.

This Court understands it is to consider verdicts in similar cases in determining whether the punitive damages awarded in this case were excessive. The Court can find only one reported decision in Alabama (in products' cases) where the Defendants' conduct even approached the degree of reprehensibility of Defendant Interstate Industries. That is the reported case of *General Motors Corporation v. Johnston,* 592 So.2d 1054 (Ala. 1992), where the Supreme Court of Alabama approved $7,500,000 for a single death. [16] The Court has approved substantial verdicts in other cases. See *Alabama Power Company v. Turner,* 575 So.2d 551 (Ala. 1991). Based on the evidence, Sears, with its knowledge, is just as guilty as State Industries and must be held responsible for what happened here.

(2) Profit

Defendants clearly profited from their refusal to utilize available safety devices. The evidence was clear to the effect that large sums of money were saved by Defendants over a period of several years. The amount of this savings to Defendants would be approximately $20,000,000 per year. State Industries has manufactured approximately two million gas water heaters per year. By failing to include available safety devices, at a cost to Defendants from $10.00 to $30.00 per heater, Defendants have saved at least $200,000,000 over a ten year period. There is evi-

dence from which the jury could have concluded that Defendants' wrongful conduct was profitable to Defendants. It is appropriate for an award of punitive damages to remove the profit, which damages actually should be in excess of the profit. The Defendants should not be allowed to profit from their wrongdoing. Between 1982 and 1992, Defendants profited by at least $200,000,000 as a direct result of their wrongdoing. The jury's punitive awards pale in comparison to this amount of savings and profit.

Our Supreme Court's decisions in *Green Oil* and *Hammond* indicate that a verdict which does no more than remove the profit [17] enjoyed by the wrong-doing Defendant cannot be considered excessive. In this case, even if Defendants had to pay the judgments, Defendants will have saved a great deal of money by not installing available safety devices which were available for use. This factor weighs heavily against any reduction in the jury's verdicts.

(3) Financial Position of Defendants

Defendants failed to put in any evidence as to the financial condition of either company. Plaintiffs did produce a document that indicated that Sears had substantial earnings and net worth. Nevertheless, Defendants conceded in post-judgment discovery that the total amount of the judgments in this case will have no adverse financial impact on Defendants. In fact, Defendants in their interrogatory answers stated that the entire amount of the judgment is covered by liability insurance and will be paid from that source. The Court therefore finds that the financial position factor cannot and should not be considered in favor of either Defendant.

(4) Cost of Litigation

The Court finds this to be a factor, but a rather small one. Even so, persons such as the Plaintiffs have to hire

lawyers to pursue product liability claims such as those in this case.

The Court is aware that Plaintiffs in products liability cases incur a great deal of expense in case preparation. The Court is [18] aware of numerous depositions being taken and other discovery being undertaken by Plaintiffs' lawyers in this case. If the verdicts were reduced, there could be an effect upon consumers in the future that would discourage them from bringing wrong-doers to trial. This factor certainly does not weigh in favor of reducing the verdicts.

(5) Criminal Sanctions

There has been no evidence produced that any criminal sanctions have been imposed upon either Defendant for the conduct related to this matter. Accordingly, the Court sees no basis to reduce the verdict by applying this factor.

(6) Civil Actions

The Court is aware of other civil actions that have been maintained against Defendants based upon similar conduct. In fact, the Court has more knowledge of these other cases than did the jury (who only knew of *one* such case). It does not appear that the verdicts or settlements in these other cases have had any substantial effect on the Defendants' conduct. In fact, in a previous case, Sears actually sued State Industries for the wrongful conduct of State Industries in connection with the manufacture and sale of similar water heaters under almost identical circumstances. Accordingly, the Court concludes that the verdicts should not be reduced based upon this factor. [19]

IV. BATSON CHALLENGE

The Court finds that Defendants' *Batson* challenge in this case has no merit. Defendants failed to make out a prima facie case of racial bias or prejudice associated with the selection of the jury. Plaintiffs' lawyers gave race-

neutral reasons for the excusing of each prospective juror excused by Plaintiffs. These reasons were completely satisfactory to the Court. The Court also notes that the corporate representative for Sears at trial was a black male, an employee of Sears, who remained for the entire trial. There was no showing to the Court that Sears is a corporation made up primarily of white persons. The same is true for State Industries. The Court finds the jury to have been properly constituted, fair, and impartial.

V. CONSTITUTIONAL CHALLENGE AS TO THE PUNITIVE DAMAGES AWARDS

The Defendants presented various constitutional challenges to the awards of punitive damages. Specifically, Defendants suggested that an award of punitive damages in this case violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, along with the clauses of the Alabama Constitution of 1901 pertaining to due process, equal protection, double jeopardy, excessive fines, and the right to trial by jury. These constitutional argument have been articulated before by others similarly situated, but all to no avail. See *Killough v. Jahandafard,* 578 So.2d 1041 (Ala. 1991); *Alabama Power Company v. Turner, Supra;* and *General Motors v. Johnston, Supra.* Once again, [**20**] the constitutional arguments advanced by the Defendants must be denied.

VI. CONCLUSIONS AND FINDINGS

The Court finds that the verdicts in this case were in no way affected by bias, passion, prejudice, corruption, or any other improper motive or conduct. The case was well tried by the lawyers on both sides. This Court is of the opinion that the lawyers for Plaintiffs and lawyers for Defendants conducted themselves in accordance with the high standards of conduct required by the members of our profession. No untoward event occurred during the trial. This Court had the opportunity to observe the jurors throughout the trial and notes that each of them paid

attention to the evidence, arguments of counsel, and the Court's charge. The jury deliberated for a considerable amount of time, after it retired, before returning verdicts in this case.

The Court further finds that there was no indication either during or after the trial to even suggest that the jury acted improperly or that the verdict was based upon prejudice, sympathy, or favoritism. To the contrary, the Court finds that the twelve people who decided this case were good and reliable citizens who discharged their duty in a conscientious manner. The Court fully charged the jury on the questions of damages in accordance with the prior decisions of the Alabama Supreme Court.

The Court specifically finds that:

1. The verdicts as to both liability and damages were all [21] supported by clear and substantial evidence on all issues.

2. The amount of compensatory damages for the Plaintiffs was not excessive.

3. The amount of punitive damages was not excessive nor disproportionate to the amount of compensatory damages.

4. The Defendants deserve to be punished because of their conduct

5. The punitive awards are needed for the added reason of deterrence.

6. The jury verdicts should therefore be upheld in their entirety.

The Court finally concludes and finds that this case was tried before a fair and impartial jury; there was substantial evidence to support the jury's verdicts in every respect; that the verdicts were not the result of any bias, prejudice, or passion on the jury's part; that the amounts of com-

pensatory damages as to each Plaintiff were supported by substantial evidence; and, that the amounts of the punitive verdicts were warranted and justified by the clear and convincing evidence of the Defendants' wrongdoing.

Accordingly, the Court is of the opinion that Defendants' motions for JNOV, new trial, and remittitur are due to be, and the same are, hereby denied.

DATED: May 12th, 1992.

/s/ Arthur E. Gamble, Jr.
CIRCUIT JUDGE

APPENDIX D

SUPREME COURT OF ALABAMA
OCTOBER TERM, 1993-94

1911519

Sears, Roebuck and Company and State Industries, Inc.

v.

Annie Harris, as administratrix of the estate of Joyce Simpson, deceased, et al

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Appeal from Lowndes Circuit Court
(CV-90-35)

RELEASED
JAN 7 1994
CLERK
SUPREME COURT OF ALABAMA

On Application for Rehearing

ALMON, JUSTICE

OPINION MODIFIED (BY SUBSTITUTION OF PAGES 6-10, 13-17, 23-39, and 44); APPLICATION FOR REHARING OVERRULED.

Hornsby, C.J., and Maddox, Shores, Steagall, and Ingram, JJ., concur.

Houston, J., concurs in part and dissents in part.

APPENDIX E

SUPREME COURT OF ALABAMA
SPECIAL TERM, 1993

1911519

Sears, Roebuck and Company and State Industries, Inc.

v.

Annie Harris, as administratrix of the estate of Joyce Simpson, deceased, et al

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Appeal from Lowndes Circuit Court
(CV-90-35)

AS MODIFIED

JAN 7 1994

ALMON, JUSTICE.

The defendants Sears, Roebuck and Company and State Industries, Inc., appeal from a $12,000,000 judgment entered on verdicts in favor of the five plaintiffs in a products liability action. The plaintiffs are Ruth McCord; Louisiana Waddell; and Annie Harris, who sued as administratrix of the estate of her deceased minor daughter Joyce Simpson and as next friend and mother [2] of her

minor children Felicia D. Simpson and Janice D. Simpson.[1] On December 17, 1989, Joyce Simpson died and Louisiana Waddell, Felicia Simpson, and Janice Simpson suffered personal injuries from carbon monoxide poisoning while they slept in Ruth McCord's mobile home. The plaintiffs brought a wrongful death and personal injury action based on the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD") and on negligent- and/or wanton-failure-to-warn theories, alleging that a defective Kenmore II gas water heater manufactured by State Industries and sold by Sears, Roebuck and Company caused the carbon monoxide poisoning.

ISSUES

The principal issues, broadly stated, are (1) Whether the plaintiffs presented substantial evidence that the water heater was the actual cause of the death and injuries suffered by the plaintiffs and their decedent; (2) Whether, as a matter of law, the water heater was substantially altered between the date of sale and [3] the date of the accident; (3) Whether the evidence supports a finding that the improper installation of the water heater was a foreseeable misuse of the product; (4) Whether there was substantial evidence that the failure to provide adequate warnings on the water heater proximately caused the death and injuries suffered by the plaintiffs and their decedent; (5) Whether

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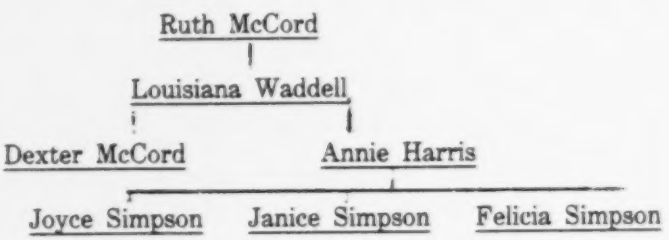
[1] The plaintiffs are all members of the same family. The following diagram shows the relationships among the family members involved in this case:



the trial court erred to reversal in allowing testimony of similar accidents to prove notice of the risk of harm caused by defects in the water heater; (6) Whether the plaintiffs presented clear and convincing evidence of wantonness; and (7) Whether the awards of compensatory and punitive damages are due to be set aside on the ground that they are excessive.

FACTS

State Industries manufactured the Kenmore II gas water heater for Sears in 1981. Sears approved the design and all labelling. Sears and State Industries designed and marketed the water heater so that consumers could install it themselves. A label on the water heater stated, "Let Sears Arrange Installation . . . or you can install it yourself." The water heater was designed for use with natural gas. The water heater, however, would burn liquid propane ("LP") gas, and nothing in its design prevented the consumer from connecting it to an LP gas line. The use of LP gas in an appliance designed for use with natural gas produces unusually large amounts of carbon monoxide because of incomplete combustion of the LP gas. [4]

The water heater came with a 15-page instruction manual inserted in a plastic pouch, which was attached to the water heater by a piece of adhesive tape. In the manual were instructions telling users how to install the water heater properly. According to the manual, proper installation included, among other things, venting the water heater by means of a pipe extending from the draft hood of the water heater to the outdoors. Fitted to the top of the water heater, the draft hood covered the flue outlet and collected exhaust gases, which were conveyed through the flue from the combustion chamber at the base of the water heater.

In addition to this manual, the water heater itself had labels containing warnings and instructions for ensuring

proper clearance from surrounding walls in closet or alcove installation and containing instructions for lighting the water heater's pilot light. The alcove and closet installation label made several references to the instruction manual and stated that the water heater should be installed in accordance with applicable local codes.

None of the labelling on the water heater warned of the dangers of carbon monoxide poisoning or explained the necessity of venting the water heater. Also, none of the labelling specifically informed the consumer that the water heater was to be used only with natural gas, and, consequently, not with liquid propane gas. One label, however, displaying sundry specifications of the water heater, such as capacity, water pressure, etc., stated "Equipped for NAT." [5] The "EnergyGuide" label also stated that its estimates of the water heater's annual cost of use were "based on a national average of NATURAL."

The water heater in this case was originally purchased from Sears in 1984 by Sam Ferlisi. After properly installing it himself and using it for a brief period in his gasoline service station, Ferlisi stored it for several years in his garage. Ferlisi subsequently gave the water heater to Ruth McCord. In November 1989, Ruth McCord had her grandson Dexter McCord install the water heater in the double-wide mobile home she shared with her great-granddaughters. (See note 1.) When Dexter McCord installed the water heater, the instruction manual was missing. Missing also were the draft hood and the inner and outer doors to the combustion chamber, which were designed to cover the opening to the combustion chamber and to be removable in order to allow users to light the water heater pilot light. Ruth McCord's mobile home was originally equipped with a small electric water heater located in a narrow closet in one of the bathrooms. After removing the electric water heater, Dexter McCord installed the gas water heater and connected it to an LP gas tank. He also installed the water heater without a pipe

to vent carbon monoxide and other exhaust gases outside the mobile home. At trial, Dexter McCord testified that when he installed the water heater he did not know that gas water heaters required venting. He also stated that he did not know the difference between natural gas and LP gas. [6]

On December 17, 1989, Louisiana Waddell and her three grandchildren, Joyce Simpson, Janice Simpson, and Felicia Simpson spent the night in Ruth McCord's mobile home. Ruth McCord was not present, because she had been admitted to a hospital on December 14, 1989, for a health problem apparently unrelated to this case. The next morning Dexter McCord found Louisiana, Joyce, and Janice unconscious, with their eyes rolled back in their heads and foam around their mouths. Felicia's eyes were open and appeared normal, but she was unresponsive and she too was foaming at the mouth. The four were taken to various hospitals and treated for severe carbon monoxide poisoning.[2] Joyce Simpson subsequently died. Three days later, Barnie Gilliland, an inspector with the Alabama Liquified Petroleum Gas Board, investigated the accident. Gilliland testified at trial that after his investigation he prepared an accident report, and that in it he concluded that the natural gas water heater was improperly installed and that the improper installation caused the injuries and the death.

During the trial, Sears and State Industries sought to prove that the water heater was not lit on the night the

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[2] When Louisiana Waddell, Felicia Simpson, and Janice Simpson were admitted, the levels of carbon monoxide in their blood was as follows: Louisiana Waddell 41%, Felicia Simpson 25%, Janice Simpson 14.6%. Dr. Edwin T. Johnson, the plaintiffs' medical expert, testified that these tests were conducted after they had been administered pure oxygen and, therefore, that the levels of carbon monoxide in their blood had probably been much higher.

According to Dr. Johnson's undisputed testimony, a level of 60% is lethal for anyone; below this threshold a variety of factors determine whether the exposed person will survive.

accident [7] occurred. Danny Register, an employee of the Highland Home Propane Gas Company, testified that he had made a service call to the mobile home on December 16, the day before the accident. According to Register, none of the family was home. Register stated that a neighbor let him in and that before he left he turned off the gas to Ruth McCord's mobile home at the LP tank. To rebut Register's testimony, the plaintiffs introduced circumstantial evidence that the trailer was locked on December 16, 1989, and that only Louisiana Waddell and Dexter McCord had keys to the trailer. Louisiana Waddell also testified that on the night of the accident she cooked with the gas stove, which was connected to the same LP gas tank.

The plaintiffs' complaint contained three counts: (1) violation of AEMLD, (2) negligence, and (3) wantonness, all based on the design, manufacture, labelling, distribution, and/or sale of the water heater.

To prove the AEMLD claim, the plaintiffs produced an expert, Wayne McCain, who testified that the water heater was defective or unreasonably dangerous in three respects. First, McCain stated his opinion that the water heater was defective because it violated the American National Standards Institute ("ANSI") standard 1.27.1. McCain stated that ANSI 1.27.1 (1975) required that an installation and instruction manual be permanently attached to the water heater. According to McCain, the fact that the pouch containing the manual was only taped to the water heater violated ANSI standards and made [8] the water heater unreasonably dangerous. Second, McCain stated that the water heater was defective because it did not have either a carbon monoxide sensor or a carbon monoxide shut-off device. These devices, McCain testified, were commercially available at the time the water heater was designed and manufactured. McCain also stated that either of these devices would have prevented the accident by either sounding an alarm or shutting off the water heater when it detected

certain levels of carbon monoxide. Third, McCain testified that the water heater was defective because the labelling on the water heater failed to instruct users to vent the water heater and to connect it to natural gas, and not LP gas, and failed to warn users of the hazards of carbon monoxide poisoning.

To prove their related wanton- or negligent-failure-to-warn claims, the plaintiffs introduced McCain's expert testimony. McCain state that in his opinion the labelling on the water heater inadequately apprised users of the need to vent the water heater and connect it to natural gas, and not LP gas, and that the labelling failed to warn of the dangers of carbon monoxide poisoning.

To prove wantonness, the plaintiffs presented the testimony of McCain and Clifford Carlton, a senior product engineer for State Industries, and other evidence to show that when the water heater was designed and manufactured, both Sears and State Industries knew that consumers were dying or otherwise suffering injuries from [9] carbon monoxide poisoning caused by the failure to vent gas water heaters properly.

For their defense, Sears and State Industries presented evidence that the water heater was not the source of the carbon monoxide gas and introduced expert testimony indicating that the water heater was not defective when made and that it had been substantially altered. The defendants also raised the affirmative defense of product misuse.

The trial court entered a $12,000,000 judgment on a jury verdict in favor of the plaintiffs, awarding the following amounts in compensatory and punitive damages:

Annie Harris, as administratrix of the estate of Joyce Simpson	$4,000,000 (Wrongful Death)

Felicia Simpson	$2,000,000 (Compensatory) $1,000,000 (Punitive)
Janice Simpson	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Louisiana Waddell	$2,000,000 (Compensatory) $1,000,000 (Punitive)
Ruth McCord	$ 750,000 (Compensatory) $ 250,000 (Punitive)
Total	$12,000,000

The trial court denied Sears and State Industries' post-judgment motion for J.N.O.V., or, in the alternative, for a new trial or remittitur, and made findings pursuant to *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

[10] DISCUSSION

Because many of the major issues in this case concern the sufficiency of the evidence and the preservation of sufficiency questions for appellate review, we begin our discussion with a general review of the applicable principles of law.

Rule 50(b), Ala. R. Civ. P., provides a specific procedure for challenging the sufficiency of the evidence:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 30 days after entry of judgment, a party who has moved for a directed verdict may file a motion to have the verdict and any judgment entered thereon set aside and to have judgment entered in ac-

> cordance with his motion for a directed verdict. . . ."

Id. In accordance with this procedure is the well-settled rule "that a motion for a directed verdict must be made at the close of all the evidence and that a timely post-trial motion for judgment notwithstanding the verdict must be subsequently made before an appellate court may consider on appeal the insufficiency-of-evidence issue directed to the jury's verdict." *Bains v. Jameson*, 507 So.2d 504, 505 (Ala. 1987); see also *Great Atlantic & Pacific Tea Co. v. Sealy*, 374 So.2d 877 (Ala. 1979); *Black v. Black*, 469 So.2d 1288 (Ala. 1985); *Housing Auth. of the City of Prichard v. Malloy*, 341 So.2d 708 (Ala. 1977). "The motion for a directed verdict may be oral even though the better practice dictates a written motion for the sake of clarity and to prevent misunderstanding." *Pettway v. Pepsi Cola Bottling Co.*, 337 So.2d [11] 757, 759 (Ala. 1976); see *Lawrence v. Lackey*, 451 So.2d 278 (Ala. 1984).

If a sufficiency issue has been properly raised and preserved, the standard of review applicable to a motion for J.N.O.V. is identical to the standard used by the trial court in ruling on a directed verdict motion. *John R. Cowley & Bros., Inc. v. Brown*, 569 So. 2d 375 (Ala. 1990); *Alpine Bay Resorts, Inc. v. Wyatt*, 539 So. 2d 160 (Ala. 1988). Like a directed verdict, a J.N.O.V. is proper when the party with the burden of presenting evidence has failed to present "substantial evidence" in support of its position. *John R. Cowley & Bros. Inc. v. Brown, supra;* § 12-21-12(a), (c), Ala. Code 1975. "Substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." *West v. Founders Life Assurance Co. of Florida*, 547 So. 2d 870, 871 (Ala. 1989). In ruling on a motion for a directed verdict or for a J.N.O.V., the court views the entire evidence and makes all reasonable inferences therefrom in favor of

the nonmoving party. *Pickett v. United States Steel Corp.*, 495 So. 2d 572 (Ala. 1986).

Causation in Fact

Because it relates to all of the plaintiffs' claims, we begin our discussion of the merits of this case by addressing the issue of causation. The issue raised by Sears and State Industries is whether the trial court erred in not directing a verdict on all [12] claims on the basis that the plaintiffs failed to prove that the water heater was lit and working at the time of the accident.

The plaintiffs argue initially that the defendant failed to preserve this issue for appellate review. The plaintiffs contend that although the defendants' motion for J.N.O.V. specifically raised this issue, their motion for a directed verdict at the close of all of the evidence did not.

After renewing at the close of all the evidence, the motion for a directed verdict they filed at the close of the plaintiffs' evidence, Sears and State Industries made a second, oral motion for directed verdict on the specific ground that the plaintiffs had presented no evidence that the pilot light on the water heater was lit on the night of the accident. The record also shows that in accordance with the procedure of Rule 50, Ala. R. Civ. P., the defendants properly renewed their motion for a directed verdict on this ground when they filed their post-judgment motion for J.N.O.V. We conclude, therefore, that this issue has been properly preserved for our review.

Sears and State Industries argue that the trial court erred in not directing a verdict in their favor on all counts because it is undisputed, they say, that on December 16, 1989, Danny Register cut off the supply of gas to the mobile home at the tank after inspecting for gas leaks and that no one relit the pilot light on the water heater before the accident. Undeniably, the defendants say, the source of the carbon monoxide was not the water heater.

[13] In all likelihood, they contend, the source was the gas stove, which, they say, the McCord family was using to heat the mobile home.

We note initially that because it was undisputed that carbon monoxide poisoning caused the injuries and the death, the critical factual determination is the *source* of the carbon monoxide. Viewing the evidence and all reasonable inferences therefrom in favor of the plaintiffs, we hold that Gilliland's trial testimony concerning the conclusions of the accident report he prepared and the considerable amount of circumstantial evidence presented by plaintiffs constitute substantial evidence from which a fair-minded person could reasonably infer that the water heater was the source of the carbon monoxide that caused the injuries and the death. The argument advanced by Sears and State Industries mistakenly assumes that because the plaintiffs were not able to dispute Danny Register's testimony with direct evidence, they did not present *any* substantial evidence to establish causation.

Although Sears and State Industries challenged the reliability of Gilliland's conclusions in the accident report, Gilliland's testimony regarding those conclusions constitutes evidence of such weight and quality that a reasonable trier of fact could infer that the water heater emitted the carbon monoxide that caused the injuries. Moreover, the extensive circumstantial evidence presented by the plaintiffs not only established an inference of causation; it also rebutted and challenged the credibility of the [14] testimony of Danny Register, who was an employee of Highland Home Propane Gas Company, a defendant originally named in this action.[3]

First, there was testimony from McCord family members that, contrary to his testimony, Danny Register could

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[3] Before this case went to trial, the plaintiffs and Highland Home Propane Gas Company entered into a settlement agreement, and all claims against Highland Home were dismissed.

not have entered the locked mobile home on December 16 when the McCord family was not at home. Although Danny Register stated that a neighbor, whom he could not later identify or remember, with a key let him into the mobile home to inspect it for leading gas, Louisiana Waddell testified that she and Dexter McCord were the only people who had keys to the mobile home. Second, members of the McCord family testified that no one relit the pilot light on the gas stove after December 16, and Louisiana Waddell testified that after cooking dinner on the gas stove the evening of December 17, she turned off the burners she had used.

Third, the plaintiffs presented circumstantial evidence creating an inference that the water heater was the only gas appliance operating in the mobile home on the evening of the accident. Ruth McCord's mobile home had four fuel-burning appliances: a kerosene heater, a gas furnance, a gas stove, and the water heater. It was undisputed that neither the kerosene heater nor the furnace was being used at the time of the accident. The only two possible sources of carbon monoxide, therefore, were the gas stove and the water heater. Because Louisiana Waddell [**15**] testified that she turned the stove off after cooking with it on the evening of the accident, a fair-minded person could reasonably infer that the water heater was the only possible source of the carbon monoxide and thus was the cause in fact of the injuries and death.

After carefully reviewing the record, we cannot say that the plaintiffs failed to present an issue of fact for the jury. In fact, in light of the disparate, conflicting evidence presented, we think the question of causation in this case is precisely the kind of question that is properly within province of the jury.

AEMLD Claim

In *Kelly v. M. Trigg Enterprises, Inc.*, 605 So. 2d 1185, 1191 (Ala. 1992), the Court restated the elements of an

AEMLD claim established in *Casrell v. Altec Indus., Inc.*, 335 So.2d 128, 132-33 (Ala. 1976), and *Atkins v. American Motors Corp.*, 335 So.2d 134, 141 (Ala. 1976):

> " 'To establish liability, a plaintiff must show:
>
> " '(1) he suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> " '(a) the seller is engaged in the business of selling such a product, and
>
> " '(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> " '(2) Showing these elements, the plaintiff has proved a prima facie case although
>
> [16] " '(a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> " '(b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller.' "

605 So. 2d 1191; see also *Yamaha Motor Co. v. Thornton*, 579 So. 2d 619, 621 (Ala. 1991).

The first issue that Sears and State Industries state in regard to the plaintiffs' AEMLD claim is whether the trial court erred in not directing a verdict for the defendant on the basis that the plaintiffs failed to prove that the lack of a carbon monoxide detector or shut-off device rendered the water heater defective.

The plaintiffs argue initially that the defendants failed to raise this issue in the trial court and therefore cannot raise it now on appeal. After meticulously examining the record, we agree. Although Sears and State Industries

presented expert testimony and other evidence to rebut the testimony of Wayne McCain that the failure to include various safety devices in the water heater's design rendered it defective, they did not raise an issue of the sufficiency of the plaintiffs' evidence, either in their written and oral motions for directed verdict at the close of the evidence or in their post-judgment motion for J.N.O.V. The defendants' motion for J.N.O.V., or, in the alternative, a new trial or remittitur contained 57 assignments of error; not one of them related to the sufficiency of the plaintiffs' evidence on this [17] issue of defectiveness. We hold, therefore, that the defendants waived appellate review of this issue.

The second AEMLD issue is whether the trial court erred in not directing a verdict for the defendants on the basis that the plaintiffs failed to prove that the condition of the water heater had not been substantially altered between the date of sale and the date of the accident.

Sears and State Industries argue that undisputed evidence shows that when the water heater was installed its draft hood and vent pipe, the inner and outer access doors to the combustion chamber, and the plastic pouch containing the instruction manual were missing. Therefore, the defendants contend, the plaintiffs failed to carry their burden of establishing that the water heater had not been substantially altered between its purchase and the time of the accident.

The plaintiffs respond by arguing that they met their burden of production either because, they say, the alterations did not cause the accident or because the alterations were reasonably foreseeable to Sears and State Industries. It was foreseeable, the plaintiffs say, that the pouch containing the instruction manual, as well as the draft hood and vent pipe, would be removed from the water heater. The plaintiffs also argue that it was foreseeable that such alterations to the condition of the water heater would cause the injuries and death.

[18] An essential element of an AEMLD claim is proof that the product reached the consumer without substantial change in the condition in which it was sold. *Clarke Indus., Inc. v. Home Indemn. Co.*, 591 So. 2d 458, 462 (Ala. 1991); see also *Caterpillar Tractor Co. v. Ford*, 406 So. 2d 854 (Ala. 1981). However, the mere fact that a product has been altered or modified does not necessarily relieve the manufacturer or seller of liability. *Johnson v. Niagara Machine & Tool Works*, 555 So. 2d 88, 91 (Ala. 1989). A manufacturer or seller remains liable if the alteration or modification did not in fact cause the injury, *Johnson*, 555 So.2d at 91 (quoting *Industrial Chem. & Fibeglass Corp. v. Hartford Acc. & Indemn. Co.*, 475 So. 2d 472, 476 (Ala. 1985));*Bullen v. Roto Finishing Systems*, 435 So. 2d 1256 (Ala. 1983); *Brown v. Terry*, 375 So. 2d 457 (Ala. 1979), or if the alteration or modification was reasonably foreseeable to the manufacturer or seller. *Clarke Indus.*, 591 So. 2d at 462; *Beloit Corp. v. Harrell*, 339 So. 2d 992 (Ala. 1976).

After reviewing the record and examining the exhibits[4] in a light most favorable to the plaintiffs and after drawing all reasonable inferences in their favor, we hold that the changes in the water heater either were not substantial alterations or, if they were substantial alterations, were foreseeable. First, the evidence shows that the vent pipe was not sold with the water [19] heater. The instruction manual states that the customer must provide his own vent pipe. Therefore, the absence of a vent pipe cannot be a substantial alteration of the product. Second, substantial evidence shows that the instruction manual, the draft hood, and the doors to the combustion chamber were detachable and easily removed. When the water heater was originally sold, the instruction manual was contained in a plastic pouch affixed to the water heater by adhesive tape.

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[4] The record on appeal included exhibits, among which were a jacket top, a draft hood, and a vent pipe.

The draft hood was attached by slipping tabs located on the legs of the draft hood into holes placed in the jacket top covering the top of the water heater. Likewise, the inner and outer doors to the combustion chamber were affixed by slipping tabs on the doors into holes located in the combustion chamber apperture. The doors appear to have been designed to be removable, in order to allow easy lighting of the pilot light. Moreover, although the defendant's expert testified that the doors were important safety devices, there was no evidence that the absence of these doors was a cause of the accident. Thus, the removal of the manual, the draft hood, and the doors was a foreseeable alteration of the water heater.

For the foregoing reasons, the trial court did not err in denying the motions for a directed verdict on the basis of a substantial alteration of the product.

The third issue raised with regard to the plaintiffs's AEMLD claim is whether the trial court erred in not directing a verdict [**20**] for the defendants based on the affirmative defense of product misuse.

Sears and State Industries argue first that the facts are undisputed that the plaintiffs failed to carry their burden of proving, as part of their prima facie case, that the water heater was used as intended by the manufacturer. The defendants contend that because the water heater was improperly installed, the product was not used as intended and that it was the improper installation, not any alleged defect, that proximately caused the injuries and the death.

Contrary to the contention of Sears and State Industries, proof that a product was used as intended is not an element of a prima facie case under the AEMLD. In *Kelly, supra,* the Court recently reaffirmed the rule that a user's misuse of an allegedly defective product is an affirmative defense to liability under the AEMLD, which the defendant must plead and prove. 605 S. 2d at 1192; see also *Banner Welders, Inc. v. Knighton,* 425 So. 2d 441, 448 (Ala. 1982);

McCalab v. Mackey Paint Mfg Co., 343 So. 2d 511, 514 (Ala. 1977); *Atkins v. American Motors Corp.*, 335 S. 2d 134 (Ala. 1976). Therefore, the plaintiffs did not have the burden of proving either that they properly installed the water heater or, more generally, that they used the water heater as intended by the manufacturer. However, because the defendants submitted evidence and moved for a directed verdict on this affirmative defense, the plaintiffs were required to present substantial evidence that the [21] water heater was not misused or that the misuse was reasonably foreseeable. § 12-21-12, Ala. Code 1975.

" 'When asserting misuse as a defense under AEMLD, the defendant must establish that the plaintiff used the product in some manner different from that intended by the manufacturer. Stated differently, the plaintiff's misuse of the product must not have been 'reasonably foreseeable by the seller or manufacturer.' ' " *Kelly*, 605 So. 2d 1192 (quoting Edward C. Martin, *Alabama's Extended Manufacturer's Liability Doctrine (AEMLD)*, 13 Am. J. Trial Advoc. 983, 1040 (1990)). Ordinarily, the plaintiff's misuse of an allegedly defective product is a factual issue for the jury. *Kelly*, 605 So. 2d 1192; *Banner Welders, Inc.*, 425 So. 2d at 448; *Beloit Corp. v. Harrell*, 339 So. 2d 992, 997 (Ala. 1976). Thus, although the appellants correctly assert that Dexter McCord did not use the water heater as intended when he improperly installed it, the inquiry under our law does not end here. The question is whether this misuse of the product was reasonably foreseeable by Sears and State Industries.

Evidence that plaintiffs introduced to prove wantonness is particularly relevant to the issue of foreseeability presented here. First, McCain testified that in 1980 it was generally known that vent failures occurred and that people could be killed by carbon monoxide poisoning as a result of such vent failures. McCain also testified that he himself was aware of several cases arising before 1984 in which a Kenmore II gas water heater had [22] been in-

adequately vented and connected to LP gas and had caused injury. Second, to prove notice or knowledge on the part of Sears and State Industries, the plaintiffs introduced, as exhibits, copies of a complaint and a summons from a wrongful death action filed against Sears and State Industries in August 1982. The complaint alleged that Sears and State Industries had breached express and implied warranties by failing to give adequate instructions and warnings regarding the dangers of carbon monoxide poisoning caused by connecting a Kenmore gas heater to LP gas. Third, Clifford Carlton, a senior product engineer with State Industries, testified, as an adverse witness, that when the water heater was being designed and manufactured, State Industries knew that consumers were being injured and killed by carbon monoxide poisoning as a result of improper installation:

"Q. Y'all were aware that folks were being killed by gas appliances, weren't you?

"A. Correct.

"Q. And you knew that y'all were in the water heater business using gas to fuel those water heaters?

"A. Correct.

"Q. And you knew that some folks were being killed because of the gas water heaters putting out carbon monoxide, didn't you?

"A. Improper installation, yes.

"Q. Did you ever ask any—you knew at that time that people were installing them wrong, sir?

"A. Could.

"Q. They—[23]

"A. People can.

"Q. They can?

"A. Yes.

"Q. And y'all knew as far back as the time this was done, that you put this one together and designed it? Sir?

"Are you telling this jury that your company knew back before this water heater was designed and manufactured that people out there were not putting them in like y'all wanted them to, or Sears, and carbon monoxide poisoning was resulting, and folks were getting killed. Y'all knew it back then, didn't you?

"A. I suppose so."

We hold that the plaintiffs presented substantial evidence to prove that when State Industries and Sears designed, manufactured, and distributed the Kenmore II gas water heater, it was reasonably foreseeable that consumers would improperly install it by connecting it to LP gas and failing to vent it properly.

Sears and State Industries' second "product misuse" argument is that the improper installation was an unforeseeable misuse, as a matter of law, because the installation constituted a violation of a regulation promulgated by the Alabama Liquified Petroleum Gas Board.

We pretermit, however, all consideration of this issue because Sears and State Industries make no legal argument beyond bare allegation and cite no legal authority, other than the applicable LP Gas Board regulation, for the asserted proposition that an improper installation of the heater by either a plaintiff or a third party constitutes, as a matter of law, an unforeseeable misuse because [24] the improper installation was a criminally punishable violation of a state administrative regulation. *Dodd v. Nelda Stephenson Chevrolet, Inc.*, [Ms. 1911399, August 6, 1993], ___ So. 2d ___ (Ala. 1993); *Sea Calm Shipping Co., S.A.*

v. Cooks, 565 So. 2d 212, 216 (Ala. 1990); *Henderson v. Alabama A & M Univ.*, 483 So. 2d 392 (Ala. 1986).

Negligent-/Wanton-Failure-to-Warn Claim

Regarding the plaintiffs' negligent- or wanton-failure-to-warn claim, Sears and State Industries raise the issue of whether the trial court erred in not directing a verdict for the defendants on the basis that the plaintiffs failed to prove that Dexter McCord would have read additional warnings. This issue bears on the element of proximate causation.

Proximate causation is an essential element of a prima facie case of either negligent or wanton failure to adequately warn. *Gurley v. American Honda Motor Co.*, 505 So. 2d 358, 361 (Ala. 1987); see also *Deere & Co. v. Grose*, 586 So.2d 196, 198 (Ala. 1991). A negligent- or wanton-failure-to-warn claim cannot be submitted to a jury unless there is substantial evidence that the allegedly inadequate warning would have been read and heeded and that it would have prevented the accident. *Precise Engineering, Inc. v. LaCombe*, [Ms. 1911918, June 18, 1993] ___ So.2d ___(Ala. 1993); *Clarke Indus., Inc. v. Home Indem. Co.*, 591 So. 2d 458, 461-62 (Ala. 1991); *Deere & Co.*, 586 So. 2d at 198; *Gurley*, 505 So. 2d [25] at 361; *E.R. Squibb & Sons, Inc. v. Cox*, 477 So. 2d 963, 971 (Ala. 1985).

Citing *Kelly v. M. Trigg Enterprises, Inc., supra, Deere & Co., supra,* and *E.R. Squibb & Sons, Inc., supra,* Sears and State Industries argue that because Dexter McCord's testimony indicates that he only "looked over" the labels on the water heater, the plaintiffs failed to present substantial evidence that he would have read the warnings that the plaintiffs allege should have been placed on the water heater.

Although Dexter McCord testified that he did not read all the labels on the water heater, he did testify that he read most of them. Dexter McCord recalled reading a label

saying "Let Sears Arrange Installation . . . or you can do it yourself," a label containing the operating instructions (which included instructions on how to light the pilot light), and a label giving instructions regarding minimum clearance for alcove installation. In addition, Dexter McCord read a label containing information, such as the water heater's serial number, model number, maximum hydrostatic pressure, gas pressure, and capacity. Dexter McCord also testified that after installing the water heater he followed the instructions on the operating instructions label when he lit the pilot light.

After reviewing the record in a light most favorable to the plaintiffs and making all reasonable inferences in their favor, this Court concludes that the plaintiffs presented sufficient evidence for the jury to reasonably infer that Dexter McCord would [26] have read additional warning labels had Sears and State Industries provided them. The labels that Dexter McCord testified to reading constitute all the existing labels that were, practically speaking, relevant to installing and operating the water heater safely. Moreover, the fact that Dexter McCord followed the directions for lighting the pilot light included on the operating instructions label also created an inference that he would have followed additional instructions and warnings.

As to the cases cited by Sears and State Industries, we find them distinguishable. Unlike the plaintiffs in this case, the plaintiff in *Deere & Co.* presented absolutely no evidence to show that the allegedly inadequate warning in the owner's manual proximately caused the plaintiff's injuries. Similarly, in *Kelley* and *E.R. Squibb & Sons, Inc.*, the undisputed evidence showed that the plaintiff did not read any of the instructions or warnings furnished with the product.

Evidence of Similar Accidents

The only evidentiary issue Sears and State Industries raise in their brief is whether the trial court reversibly

erred in allowing plaintiffs' counsel to question McCain about other accidents involving Kenmore II Sears water heaters without, according to Sears and State Industries, laying a proper foundation.

During direct examination, plaintiffs' counsel asked McCain if he was familiar with any cases before 1984 in which a Sears Kenmore [27] II water heater had been inadequately vented and connected to LP gas. When McCain replied that he was, defense counsel objected:

> "Q. Are you familiar with any cases prior to 1984 where a water heater, a Kenmore II water heater was inadequately vented and connected to LP gas?
>
> "A. Yes, Sir.
>
> "MR. HARTLEY: Objection, Judge.
>
> "THE COURT: What's the grounds?
>
> "MR. HARTLEY: Asking for specific cases.
>
> "THE COURT: He didn't ask him for a specific case. He just asked him if he knew if there were any."

Counsel for Sears and State Industries made no other argument in support of this objection. It is clear from the context of this testimony that the plaintiffs were attempting to prove notice and foreseeability.

In their brief to this Court, the defendants argue that it was reversible error for the trial court to allow this questioning without requiring a foundation showing that the other cases arose from "substantially similar circumstances." Ordinarily, to prove notice of a defective condition of a product by establishing other, prior accidents, a party must lay a predicate showing that the products that caused the other accidents were in substantially the same condition as the product that is the subject of the

action. See *General Motors Corp. v. Johnston,* 592 So. 2d 1054, 1058-59 (Ala. 1992). See generally C. Gamble, *McElroy's Alabama Evidence* § 64.04 (4th ed 1991).

[28] We hold, however, that Sears and State Industries waived the issue they now argue, because the ground for exclusion they argue on appeal is not the ground they specified at trial. " 'The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial.' " *B.A.S.S. Coal, Inc. v. Black Warrior Minerals, Inc.,* 579 So. 2d 1325, 1327 (Ala. 1991) (quoting *Ex parte Frith,* 526 So. 2d 880, 882 (Ala. 1987). From the portion of the transcript quoted above, it appears that the trial court understood defense counsel's objection to be directed at anticipated testimony from McCain regarding the other cases involving Kenmore II water heaters. When the trial court overruled Sears and State Industries' objection by saying that McCain had not been asked about any "specific case," defense counsel did not seek to state or clarify any other basis for their objection. Therefore, we conclude that Sears and State Industries did not object to McCain's testimony on the basis of any failure to lay a predicate showing "substantial similarity." Moreover, even if in the circumstances of this case this testimony was erroneously admitted without a proper predicate, the error would have been harmless, in light of the large amount of evidence introduced by the plaintiffs to prove notice and forseeability. Rule 45, Ala. R. App. P.

[29] Clear and Convincing Evidence of Wantonness

The first issue raised with regard to the punitive damages verdict is whether the $2,500,000[5] award of punitive

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[5] Sears and State Industries do not direct their argument here to the $4,000,000 in punitive damages awarded on the wrongful death claim. We note that § 6-11-20(a), Ala. Code 1975, specifically excludes punitive damages awarded in wrongful death actions from the require-

damages was supported by clear and convincing evidence of wantonness. The plaintiffs argue that the defendants cannot challenge the punitive damages award on the ground that wantonness was not proved by clear and convincing evidence when they did not raise the issue in their motion for a directed verdict. We disagree.

Although the defendants did not preserve the issue of the sufficiency of the evidence to prove wantonness, they did properly preserve the issue of whether wantonness was proved by clear and convincing evidence for purposes of the punitive damages award, because they raised the issue in their motion for J.N.O.V., or, in the alternative, for a new trial or remittitur.

It is not necessary, *before entry of judgment,* to object to the absence of clear and convincing evidence of wantonness in order to preserve the issue for appellate review. An objection based on a party's failure to present substantial evidence of wantonness is different from an objection based on a party's failure to prove wantonness by "clear and convincing" evidence. The former relates to the issue of whether a party has presented sufficient evidence [30] to present an issue of fact for the jury; the latter relates to whether a party has proved wantonness by sufficient weight of the evidence to justify the jury's imposition of punitive damages. The issue of whether an award of punitive damages is supported by clear and convincing evidence necessarily does not arise either until a party requests an instruction on punitive damages or until after the jury renders a verdict and the trial court enters a judgment. Thus, even though Sears and State Industries did not challenge the sufficiency of the evidence on the claims of wantonness, they did properly raise the issue of whether the award of punitive damages was supported by

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ment of proof by "clear and convincing evidence." Sears and State Industries, however, do raise the issue of excessiveness with regard to the $4,000,000 award; that issue is discussed *infra.*

clear and convincing evidence, in their post-judgment motion for J.N.O.V., or, in the alternative, a new trial or remittitur.

In *Shoals Ford, Inc. v. Clardy,* 588 So. 2d 879 (Ala. 1991), this Court stated the following applicable principles:

> "Whether a defendant's conduct was committed willfully, wantonly, or intentionally is a question for the jury on the issue of punitive damages (*Surrency v. Harbison,* 489 So. 2d 1097 (Ala. 1986)), and on appeal there is a presumption of correctness as to the amount of punitive damages awarded by the trier of fact. See *Armstrong v. Roger's Outdoor Sports, Inc.,* 581 So. 2d 414 (Ala. 1991) (a case in which this Court declared Ala. Code 1975, § 6-11-23(a), § 6-11-24(a), and the parenthetical portion of § 6-11-24(b) unconstitutional).
>
> "In Ala. Code 1975, § 6-11-20(b)(3), 'wantonness' is defined as 'conduct which is carried on with a reckless or conscious disregard of the rights and safety of others.' In order to award punitive damages, the wanton conduct must be proven by 'clear and convincing evidence,' Ala. Code 1975, § 6-11-20(a), which is defined in § 6-11-20(b)(4) as follows:
>
> [31] " 'Evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.' "

Id. at 884.

Sears and State Industries argue that imposing $2,500,000 in punitive damages on them was error because, they argue, there was no "clear and convincing evidence" of wantonness. More specifically, they argue that because industry standards did not require a carbon monoxide sensor or a shut-off safety device and because no other manufacturer used them, they had no reason to believe that failure to use them would create an unreasonably dangerous condition.

The evidence introduced by the plaintiffs to prove wantonness, however, belies the defendants' contentions. The plaintiffs presented evidence that the dangers of carbon monoxide poisoning from gas appliances had been generally known in the industry at the time the water heater was designed; that Sears and State Industries had designed, manufactured, marketed, and distributed the Kenmore II gas water heater to be installed by consumers; that Sears and State Industries were actually aware that consumers were misinstalling gas water heaters by connecting them to LP gas and by failing to vent them properly; that Sears and State Industries were actually aware that such improper installation had caused deaths [32] and injuries from carbon monoxide poisoning; that a wrongful death action based on carbon monoxide poisoning caused by connection of a Kenmore II gas water heater to LP gas had been filed against Sears and State Industries in 1981; and that notwithstanding knowledge of these facts, Sears and State Industries did not place any additional warning or instruction labels on the water heater or otherwise alter its design.

Addressing the defendants' more specific contention, we note that adherence to ANSI industry standards does not, *in and of itself,* relieve a manufacturer from liability for damages based on claims of wantonness, when other evidence clearly and convincingly shows that if knew of the

risk of injury and death posed by its products. *Cf., King v. National Spa & Pool Institute, Inc.*, 570 So. 2d 612 (Ala. 1990). Compliance with such industry standards does not allow a manufacturer to close its eyes to injuries caused by its products and do nothing to alter their design or to warn users. The same may be said for the defendants' argument that they could not have been wanton because no other manufacturer of gas water heaters employed a carbon monoxide sensor or shut-off device. Moreover, we note that Clifford Carlton admitted at trial that Ernest Wenczl, the chief designer of the Kenmore II water heater and a member of an ANSI subcommittee on standards for gas water heaters, had for many years actively opposed efforts to require the use of carbon monoxide sensors on gas water heaters.

[33] We hold, therefore, that the evidence set out above, together with other evidence in the record, constituted clear and convincing evidence that Sears and State Industries consciously disregarded the rights and safety of the plaintiffs when they designed, manufactured, and distributed the Kenmore II gas water heater.

Due Process Rights

Sears and State Industries challenge the punitive damages awards under the due process clause of the Fourteenth Amendment to the United States Constitution. The two issues they raise are (1) whether the trial court's judgment violates the due process rights of the defendants on the basis that it does not apprise them of the extent of the punishment imposed for their conduct, and (2) whether the trial court's judgment violates the due process rights of the defendants by meting out multiple and differing punishments for a single wrongful act.

We find that the defendants waived these issues when they requested special verdict forms, materially similar to the ones eventually submitted to the jury, asking the jury

to return separate awards of punitive damages for each plaintiff, if the jury chose to award punitive damages. Sears and State Industries cannot now on appeal base an argument for reversal on alleged error that they themselves invited. E & S Facilities, Inc. v. Precision Chipper Corp., 565 So. 2d 54, 60 (Ala. 1990); Phillips v. Anesthesia Servs., P.C., 565 S. 2d 127, 129 (Ala. 1990); Osborn v. Johns. 468 So. 2d 103, 110 (Ala. 1985).

[34] Excessiveness of the Jury Verdicts

Sears and State Industries request this Court to condition any affirmance of the judgment on a substantial remittitur of the compensatory and punitive damages awards on the ground that the verdicts are excessive.

Subject to important state constitutional constraints, this Court has the authority under § 12-22-71, Ala. Code 1975, to determine the proper amount of recovery and to affirm the judgment, subject to the filing of a remittitur of the amount in excess of the proper amount, when the Court concludes that the judgment is excessive. The right to a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, § 11, Const. 1901, and a jury verdict may not be set aside or remitted unless the verdict is flawed, thereby losing its constitutional protection, *Hammond v. City of Gadsden,* 493 So. 2d 1374, 1378 (Ala. 1986), or unless, in the case of a punitive damages verdict, it exceeds the amount necessary, in the particular circumstances of the case, to accomplish society's goals of punishment and deterrence, *Green Oil Co. v. Hornsby,* 539 So. 2d 218 (Ala. 1989).

Although Sears and State Industries address their excessiveness-of-the-verdict argument to the particular circumstances of each personal injury plaintiff, their common objection is the absence of severe, long-term or permanent, physical impairment and suffering. As stated by one of the plaintiffs' expert witnesses, Dr. Edwin T. Johnson,

individuals may [35] not necessarily suffer long-term effects after being exposed to carbon monoxide gas for an appreciable period. In fact, Dr. Johnson testified, most do not. Although it is true that the plaintiffs' special damages in this case are minor and their long-term symptoms or permanent injuries relatively slight, the Court cannot discount the mental anguish associated with the experience of almost dying of carbon monoxide poisoning in one's sleep. However, after carefully reviewing the evidence, we conclude that the compensatory damages awards are excessive. Therefore, we order the following remittiturs.

First, we order a remittitur of the $750,000 in compensatory damages awarded to Ruth McCord. Although the jury could have speculated that Ruth McCord suffered from the effects of carbon monoxide poisoning before she entered the hospital on December 14, 1989, the plaintiffs presented no substantial evidence that she suffered any physical injury as a result of exposure to carbon monoxide gas. The only evidence of personal injury presented at trial was Annie Harris's brief testimony that Ruth McCord worried about death, that she suffered mental anguish over the loss of Joyce Simpson and the injuries suffered by McCord's daughter and McCord's other great granddaughters and that after the accident her health worsened. We note that Ruth McCord herself did not testify at trial. In light of the paucity of evidence to support her claim [36] for damages for personal injury, we remit the jury's award of $750,000 in compensatory damages to Ruth McCord to $1.00.[6]

Second, we order a remittitur with regard to the $750,000 in compensatory damages awarded to Janice Simpson. Although Janice suffered from acute carbon monoxide poisoning, her hospital costs amounted to only $1,962,

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[6] We note that Ruth McCord had received $142,500 in a pretrial settlement with several other defendants, who were dismissed before trial.

and Dr. Johnson could not specify any long-term effect from the poisoning. Janice testified that she was doing fine physically, had no health problems, and was doing well in school. In light of this evidence, we remit the $750,000 in compensatory damages to $100,000.

Third, we order a remittitur with regard to the $2,000,000 in compensatory damages awarded to Felicia Simpson. Like the others who were in the mobile home, Felicia suffered from acute carbon monoxide poisoning. However, her hospital costs were only $1,202, and the only long-term symptom to which she testified was blurred vision. Dr. Johnson testified that blurred vision was a long-term symptom of carbon monoxide poisoning and that when he examined Felicia, she reported blurred vision in her right eye. However, Dr. Johnson was not certain that carbon monoxide was the cause of Felicia's blurred vision. In light of this evidence, we remit the $2,000,000 award in compensatory damages to $250,000.

Fourth, we order a remittitur with regard to the $2,000,000 in compensatory damages awarded to Louisiana Waddell. As with the [37] other plaintiffs sleeping in the mobile home on the evening of the accident, Louisiana suffered acute carbon monoxide poisoning, which, because of her age and her existing health problems, had lasting effects. The evidence showed that Louisiana incurred approximately $10,000 in hospital expenses and that she suffered from long-term effects of carbon monoxide poisoning. According to Dr. Johnson, the carbon monoxide poisoning aggravated the hypertension for which she had received treatment before the accident. Louisiana complained of continuous headaches, dizziness, nausea, and shortness of breath, which restricted her movement. In light of this evidence, we remit the $2,000,000 award of compensatory damages to $500,000.

We now turn our attention to the $2,500,000 in punitive damages awarded in the three personal injury claims and

the $4,000,000 in wrongful death damages. The considerations that inform our analysis of the defendants' contention that the punitive damages awards are excessive differ somewhat from those that guided our analysis of the compensatory damages awards. When excessiveness of punitive damages is the issue, the focus of our review is not on the plaintiff's injuries, but, rather, is on the reprehensibility of the defendant's conduct. *General Motors Corp. v. Johnston,* 592 So.2d 1054, 1063 (Ala. 1992). In compliance with the procedures mandated by *Hammond* and *Green Oil,* the inquiry is whether the amount of punitive damages awarded exceeds the amount [38] necessary to accomplish society's goals of punishment and deterrence. *Green Oil,* 539 So.2d at 218.

After thoroughly reviewing the evidence in this case, we conclude that the punitive damages awards were not excessive. Sears and State Industries specifically designed the Kenmore II gas water heaters to allow users to install them themselves. By so marketing the Kenmore II, the defendants came under a legal duty to anticipate reasonably foreseeable ways in which consumers would misinstall their product and injure themselves and to change its design to eliminate the risks associated with such misuses or to adequately warn consumers of those risks. The plaintiffs convincingly showed that, even though the defendants were clearly aware that some consumers were misinstalling their gas water heaters and suffering death or serious injuries, they did nothing to alter the design or labelling of their product. Therefore, in light of the reprehensibility of Sears and State Industries' wanton conduct and the extreme risk of injury or death that conduct created, we cannot say that the punitive damages awards were excessive.

Moreover, we note that the amount of the punitive damages awarded in this case is not inconsistent with the amounts of other punitive damages awards affirmed by this Court E.g., *Atkins v. Lee,* 603 So. 2d 937 (Ala. 1992)

($6,875,000 wrongful death award affirmed); *General Motors Corp. v. Johnston,* 592 So. 2d 1054 (Ala. 1992) (judgment affirmed, conditioned on remittitur of $7,500,000 [39] of jury's $15,000,000 wrongful death award); *Industrial Chem. & Fiberglass Corp v. Chandler,* 547 So. 2d 812 (Ala. 1988) $5,000,000 punitive damages award affirmed).

Based on the foregoing, the judgment is therefore affirmed, conditioned upon remittitur, as indicated above. The plaintiffs shall, within 30 days after the date of this opinion, file a remittitur, pursurant to § 12-22-71, Ala. Code 1975, reducing the total judgment as ordered herein; otherwise, this judgment will stand reversed and the cause remanded for a new trial.

AFFIRMED CONDITIONALLY.

Hornsby, C.J.,* and Maddox, Shores, Adams, Steagall, and Ingram, JJ., concur.

Houston, J., dissents in part, and concurs in part conditionally to affirm.

[40] Sears, Roebuck v. Annie Harris, administratrix, etc.

HOUSTON, JUSTICE (dissenting in part; concurring in part conditionally to affirm).

I write only to express my concern about the inconsistent punitive damages verdicts.

Sears and State Industries were punished to the extent of $4,000,000 for the single act or omission giving rise to liability on the claim of Ms. Harris for the death of Joyce Simpson. *For this same act or omission giving rise to liability,* Sears and State Industries were punished by an award of $1,000,000 on the claim of Felicia Diane Simpson and by an award of $1,000,000 on the claim of Louisiana

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*Although Chief Justice Hornsby did not sit at oral argument, he has studied the record and listened to the tapes of oral argument.

Waddell; and to further complicate this matter, *for this same act or omission giving rise to liability*, Sears and State Industries were punished by an award of only $250,000 on the claim of Janice Denise Simpson and by an award of only $250,000 on the claim of Ruth McCord. The same act or omission giving rise to liability occurred in each case.

The following is the entire jury charge as it relates to punitive damages:

> "You take the law as the Court gives it to you and apply it to the facts as you determine them to be in arriving at your verdict. . . .
>
> "All of those claims [five different claims] are made on the grounds that the defendants . . . were negligent *or* wanton in their conduct. . . .
>
> ". . .[T]he plaintiffs also complained that . . . the defendants acted wantonly.
>
> "[The court defined wantonness and willfulness.] [41]
>
> ". . . Ms. Harris has a claim . . . under the wrongful death act for the wrongful death of Joyce and the law says that in a suit brought for wrongful acts, omission, or negligence causing the death or damages recoverable [sic]. Damages recoverable are punitive not compensatory.
>
> "Damages in this type action are entirely punitive imposed for the preservation of human life and as a deterrent to others to prevent similar wrong. The amount of damages should be directly related to the amount of wrongdoing on the part of the defendant.
>
> "In assessing damages you are not to consider the monetary value of the deceased. For damages of this type of action are not recoverable to com-

opensate the family for the—of the deceased from a monetary standpoint on account of her death nor to compensate the plaintiff for any financial loss sustained by her for the family of the deceased on account of the death.

"Your verdict . . . should be directly related to the culpability of the defendants and necessity for preventing similar wrong in the future.

". . . .

"Punitive damages are allowed to the plaintiff and may be awarded in the sound discretion of the jury in cases where the plaintiff reasonably satisfies the jury from the evidence that the plaintiff has been willful [sic] or wantonly injured by the defendant.

". . . .

"Now, so far as the matter of punitive damages is concerned, punitive damages, as you will recall I told you, could be awarded in your discretion where you find that the Defendants have been guilty of wanton conduct or in a wrongful death case.

"And the law says the matter of punitive damages is set out in the Code of Alabama in Section 6-11-20 and in its pertinent parts it reads as follows:

> " 'Punitive damages may not be awarded in any civil action except actions for wrongful death other than tort actions where it is proven by clear and convincing evidence that the Defendant consciously or deliberately [42] engaged in oppression, wantonness or malice with regard to the Plaintiff.'

> "Now, as it is used in that statement wantonness is conduct which is carried on in a reckless or conscious disregard for the rights of others.
>
> "The right to punitive damages must be . . . shown by clear and convincing evidence. Evidence tht would—clear and convincing evidence that would weigh against—when weighed against evidence in opposition would produce in the minds of the trier of the facts a firm conviction as to the essential elements of the claim and a high probability as to the correctness of the conclusions.
>
> "Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or substantial weight of the evidence, but less than beyond a reasonable doubt.
>
> "You take into consideration when—if you determine . . . that the plaintiff is entitled to punitive damages."

I will assume that the jury did not find clear and convincing evidence of wantonness or willfulness to support a punitive damages award of $4,000,000 for Janice Denise Simpson, Ruth McCord, Louisiana Waddell, and Felicia Diane Simpson's claims, but did find substantial evidence of negligence, wantonness, or willfulness to support an award of $4,000,000 in punitive damages in the wrongful death case. Punitive damages "should not exceed an amount that will accomplish society's goal of punishment and deterrence" in wrongful death cases. *General Motors Corp. v. Johnston,* 592 So.2d 1054, 1063 (Ala. 1992). Alabama's wrongful death statute (or this Court's interpretation of it, which has thus far escaped legislative correction) is "a riddle wrapped in a mystery inside an

[43] enigma."[7] I have no standard by which to determine whether a wrongful death award is excessive or inadequate.[8] It is not excessive or inadequate if five members of this Court hold that it is not excessive or inadequate; it is excessive or inadequate if five members of this Court hold that it is excessive or inadequate. At least five other members of this Court hold that the award in this wrongful death case is not excessive; therefore, I concur.

However, the punitive damages verdicts that a single jury returned for Felicia Diane Simpson, Louisiana Waddell, Janice Denise Simpson, and Ruth McCord are inconsistent verdicts, because they were all supposed to be based on the same standard: clear and convincing evidence of "culpability of the defendants and necessity for preventing similar wrong in the future." Punitive damages *qua* punitive damages also must not exceed an amount that will accomplish society's goals of punishment and deterrence. *Wilson v. Dukona Corp.*, 547 So.2d 70 (Ala. 1989). The $1,000,000 punitive awards as to Felicia Diane Simpson and Louisiana Waddell exceeded society's goal of punishment and deterrence by $750,000 each, for the same jury set society's goal of punishment and deterrence for the same act or omission giving rise to liability at $250,000 as to [44] Janice Denise Simpson and Ruth McCord. Therefore, the verdicts are inconsistent. Rather than reverse and remand for a new trial, I would affirm the judgment, conditioned upon remittitur of $750,000 of the punitive damages awards to Felicia Diane Simpson and Louisiana Waddell, so that the punitive damages award to each

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[7] Winston Churchill, radio broadcast, October 1, 1939 (referring to the Soviet Union).

[8] This Court has recently affirmed an award of $500 in a wrongful death case in which the act or omission that the jury found proximately caused the death was no less culpable than the act or omission of Sears and State Industries in the case at issue. *Ross v. Rogers*,[Ms. 1920032, August 27, 1993] ___ So.2d ___ (Ala. 1993).

plaintiff other than Ms. Harris, as administratrix, is $250,000.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-616

SEARS ROEBUCK AND COMPANY and STATE INDUSTRIES, INC.,

Applicants,

v.

ANNIE HARRIS, AS ADMINISTRATRIX OF THE ESTATE OF JOYCE SIMPSON, ET AL.,

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the response and the reply filed thereto,

IT IS ORDERED that the enforcement of the judgment of the Supreme Court of Alabama, case No. 1911519, issued September 10, 1993, and modified on rehearing January 7, 1994, be stayed pending the timely filing and disposition by this Court of a petition for writ of certiorari on the condition that the supersedeas bonds in the amount of $15,000,000 shall remain in effect. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court or further order of the Court.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 10th day
of February, 1994

APPENDIX G

IN THE CIRCUIT COURT FOR LOWNDES COUNTY, ALABAMA

CASE NO. CV-90-35

ANNIE HARRIS, et al.,
PLAINTIFFS,

VS.

SEARS, ROEBUCK & COMPANY, et al.,
DEFENDANTS.

ANSWER

* * *

[7] 5. The claims for punitive damages asserted by the plaintiffs are violative of the Constitutions of the United States of America and the State of Alabama.

6. The Alabama Wrongful Death Statute, § 6-5-410, is contrary to the Constitution of the United States of America and the Alabama Constitution in that it imposes excessive fines without proper standards.

7. Any award of punitive damages would deprive the defendant of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and the Alabama Constitution of 1901.

8. An award of punitive damages would deprive the defendant of property without due process of law since there is a lack of sufficient standards and safeguards governing punitive damage awards in Alabama.

9. The award of punitive damages is in violation of the due process guarantees of the United States and Alabama Constitutions in that it grants wholly standardless discre-

tion to the jury to determine the severity of the [8] punishment of the defendant.

10. The award of punitive damages is not allowable in that it is in violation of Article I, Sections 1, 6, and 22 of the Constitution of Alabama of 1901 which provides that no person shall be deprived of life, liberty or property except by due process of law. Defendant received no advance notice of possible punishment set by an upper limit. Punishments must be predicated upon foreseeable standards and known penalties.

11. In the absence of sufficient standards under Alabama law, the imposition of punitive damages also violates the equal protection clause of the United States Constitution.

12. An award of punitive damages against the defendant is impermissible under the excessive fines clause of the Eighth Amendment of the United States Constitution and Article I, § 16 of the Constitution of Alabama of 1901.

13. An award of punitive damages against the defendant would constitute a "fine" within the excessive fines clause of the Eighth Amendment of the United States Constitution and should be awarded only upon affording the defendant those rights and safeguards provided in criminal cases.

14. The award of any punitive damages would be in violation of the procedural safeguards under the Sixth Amendment of the Constitution of the United States in that punitive damages are penal in nature and consequently [9] defendant is entitled to the same procedural safeguards allowed to criminal defendants.

15. Plaintiffs are not entitled to recover for punitive damages in this action because the required burden of proof is less than the "beyond a reasonable doubt" burden required in criminal cases.

16. The Alabama Wrongful Death Statute is unconstitutional in that a plaintiff need only establish simple negligence to recover. The statute does not require intentional or wanton conduct on the part of the defendant.

17. The standards for awarding punitive damages are vague and nebulous and are not rationally related to a legitimate government interest.

18. Plaintiff lacks standing to bring this action and is not a proper party in interest.

/s/ Gerald C. Swann, Jr.
GERALD C. SWANN, JR.

/s/ C. Winston Sheehan, Jr.
C. WINSTON SHEEHAN, JR.

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APPENDIX H

IN THE CIRCUIT COURT FOR LOWNDES COUNTY, ALABAMA

CIVIL ACTION NO. CV 90-35

ANNIE HARRIS; ET AL

PLAINTIFFS

VS.

SEARS, ROEBUCK & COMPANY; ET AL

DEFENDANTS

PROPOSED DEFENDANTS' POSITION

* * *

10. These defendants contend that the plaintiffs have failed to plead an adequate basis for punitive damages and that the plaintiffs' claims for punitive damages are violative of the Constitutions of the United States of America and the State of Alabama. Defendants deny that the plaintiffs have established by clear and convincing evidence that these defendants consciously and deliberately engaged in oppression, fraud, wantonness, or malice so as to support a claim for punitive damages.

Attorneys for Defendants,
Sears, Roebuck and Co. and
State Industries, Inc.

/s/ Lyman H. Harris
Lyman H. Harris

/s/ Susan Rogers
Susan Rogers

/s/ Richard P. Hartley
Richard P. Hartley

APPENDIX I

IN THE CIRCUIT COURT OF LOWNDES COUNTY, ALABAMA

CIVIL ACTION NO.: CV-90-35

ANNIE HARRIS,

Plaintiff,

V.

SEARS, ROEBUCK and CO.

Defendant.

FILED
MAR 27 1992
CIRCUIT CLERK

MOTION FOR JUDGMENT NOTWITHSTANDING A VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, MOTION FOR REMITTITUR

* * *

49. The award of punitive damages in this case violates the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, jointly and separately, of the Constitution of the United States, and the clauses under the State Constitution pertaining to due process, equal protection, double jeopardy, excessive fines and the right to trial by jury, in each of the following separate and in several ways:

a. Joint and several judgments may be awarded against multiple defendants for different alleged acts of wrongdoing.

b. There are no means provided for awarding separate judgments against alleged joint-feasors.

c. There is no limit placed on the amount of an award against these defendants.

d. There are no specific standards provided upon which to base an award of punitive damages as against these defendants.

e. The procedures to be followed permit the award of punitive damages against these defendants upon the satisfaction of the standard of proof less than that applicable to the imposition of criminal sanctions.

f. The procedures to be followed permit multiple awards of punitive damages for the same alleged act or omission.

g. There are no provisions for clear and consistent appellate standards of review of any award of punitive damages against these defendants.

h. The standard of conduct upon which punitive damages are sought against these defendants are vague and ambiguous.

i. The procedures to be followed fail to provide a meaningful opportunity for challenging the excessiveness of such awards.

j. The procedures permit and encourage varying degrees of punishment for a single wrongful act and are inherently and fundamentally flawed in permitting and encouraging inconsistent verdicts.

k. The procedures permit and encourage punishment multiple times in one proceeding, in varying degrees, for a single wrongful act and violates these defendants' rights to be free from double jeopardy under the State and Federal Constitutions.

50. The punitive damages awarded in this case resulted from unguided jury discretion to award punitive damages, in the absence of any expressed statutory limit, and violate the Fifth and Fourteenth Amendments (due process clauses) of the United States Constitution.

51. The jury award of punitive damages in this case is excessive under the state common law guidelines set forth in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) and its progeny.

52. The imposition of punitive damages, partly on grounds of defendants' wealth or size, violates the Federal Constitutional freedom from punishments based upon status, which is guaranteed under the First and Fourteenth Amendments (equal protection and due process clauses) of the United States Constitution.

53. To allow the award of punitive damages in this case to stand violates the self incrimination clause of the Fifth Amendment to the United States Constitution and Article I, § 6, of the Alabama Constitution of 1901 in that the damages awarded are penal in nature, while the defendants are required to disclose documents and/or other evidence without the usual constitutional safeguard against self incrimination.

54. An award of punitive damages in this case for personal injury claims and for claims made under the Alabama Wrongful Death Act is unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 6 of the Constitution of the State of Alabama of 1901 in that no person shall be deprived of life, liberty or property except by due process of law and that the punitive damages claimed are vague and not rationally related to any legitimate government interest.

55. To allow the award of punitive damages against these defendants violates the rights of these defendant under the excessive fines clauses of the United States Constitution and the Alabama Constitution in that it imposes excessive fines without proper standards.

56. The evidence presented in this case was so insufficient that the verdict was obviously based upon racial bias and prejudice in the favor of the plaintiffs. The entire jury was black, the plaintiffs were black, and the defendants were white.

57. The Court erred in denying defendants' *Batson* challenge in this case. There were forty-one members of the jury panel. There were nine whites on the panel. Plaintiffs struck eight of the nine whites and struck the ninth one last, which made her the alternate. Defendants are constitutionally entitled to a trial by jury of their peers. Their *Batson* challenge should have been upheld.

58. Upon review of the official transcript, defendants have noted that certain pages are missing from the official transcript. Defendants' specifically reserve the right to supplement their post-trial motions once they have received a complete transcript of the trial and have been able to review same.

59. Pursuant to Rule 4(a)(3), ARAP, the defendants do not waive any other error or ground of reversal previously asserted in the trial court.

APPENDIX J

IN THE SUPREME COURT OF ALABAMA

Supreme Court No. 1911519

SEARS, ROEBUCK and CO. and STATE INDUSTRIES, INC.

Appellants,

vs.

ANNIE HARRIS, et al.

Appellees.

FILED
AUG 20 1992
CLERK
SUPREME COURT OF ALABAMA

ON APPEAL FROM THE CIRCUIT COURT OF LOWNDES COUNTY, ALABAMA
CIVIL ACTION NO.: CV 90-35

BRIEF OF APPELLANTS SEARS, ROEBUCK and CO. and STATE INDUSTRIES, INC.

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ORAL ARGUMENT IS REQUESTED

* * *

IX. THE JUDGMENT OF THE TRIAL COURT IS INVALID UNDER THE UNITED STATES CONSTITUTION.

Sears and State Industries present to this Court constitutional challenges never previously addressed in Alabama. Defendants pray this Court to give very serious consideration to the arguments made, and to the impact this Court's decision will have on future cases.

The judgment of the trial court is constitutionally deficient in two ways, each addressed separately below. First, the judgment imposed by the trial court imposing punishments of differing amounts for a single wrongful act by the defendants fails to apprise the defendants with any degree of certainty, as required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, of the extent of punishment for the single wrongful act committed. Second, the repeated punishments imposed by the judgment of the trial court violate the rights of these defendants secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.[14]

A. THE TRIAL COURT'S JUDGMENT VIOLATES THE DUE PROCESS RIGHTS OF THE DEFENDANTS BECAUSE IT DOES NOT APPRISE THEM OF THE EXTENT OF PUNISHMENT IMPOSED FOR THEIR ACT.

In the fifth decision published in the long history of this Court, this Court reversed and remanded a judgment because of its facial uncertainty. *Jones v. Acre*, 1 Minor 5 (1820). Over a century and a half later, this Court clung steadfastly to the rule that a judgment must be both so

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[14] The constitutional deficiencies in the judgment argued here were specifically challenged in paragraphs 49(f), (j), and (k), and 50 and 54 of defendants' Post-Judgment Motions, and specifically addressed and overruled at pp. 19-20 of the Order denying defendants' Post-Judgment Motions. (C. 1146-1168, 1196-1216)

certain and definite as to apprise the parties of what has been determined. In *Jewell v. Jackson & Whitsitt Cotton Co.*, 331 So. 2d 623 (Ala. 1976), this Court recognized that a "final judgment"

> must be conclusive and certain in itself. *Gandy v. Hagler*, 245 Ala. 167, 16 So. 2d 305; *Bell v. Otts*, 101 Ala. 1986, 12 So. 43. All matters should be decided; damages should be assessed with specificity leaving the parties with nothing to determine on their own. A judgment for damages to be final must, therefore, be for a sum certain determinable without resort to extraneous facts.

Id. at 625.

A judgment "should be always be complete and certain in itself, specifically showing that it is the court's adjudication of the matter, title, or damages dealt with." *Gandy v. Hagler*, 245 Ala. 167, 170, 16 So. 2d 305 (1944); *accord Ex parte Louisville & N.R. Co.*, 214 Ala. 489, 492, 108 So. 37 (1926); *Plunkett v. Dendy*, 197 Ala. 262, 263, 72 So. 525 (1916); *Bell v. Otts*, 101 Ala. 186, 187, 12 So. 43 (1893); *Drane v. King & Devitt*, 21 Ala. 556 (1852). Moreover, judgment should never enter on a jury verdict that does not respond to or decide the issues submitted. *Ramer v. Fletcher*, 29 Ala. 470 (1856).

Tying all of the foregoing principles together, the rule in Alabama is that a judgment uncertain as to the proper amount awarded is invalid. *Jones v. Acre, supra.*

Inherent in the procedures dictated by this Court is the concept that a "final judgment" brings a close to the proceedings at the trial court level. Rules 54(a) and (b), Ala. R. Civ. P. Judgments may be entered upon default, Rule 55, or upon summary proceeding, Rule 56, or upon the request for a declaration of rights and obligations, Rule 57, or upon the offer of a party, Rule 68. The clerk is required to maintain a correct copy of every final judgment. Rule 79. This Court has likewise dictated the ministerial and technical requirements to which a valid judgment must conform. Rule 58. In fact, Rule 54 itself

makes clear that "judgments" include only those decrees sufficiently *final* and *certain* to support an appeal. Rule 54(a), and Committee Comments appertaining.

The process that is due regarding judgments thus established, the inquiry focuses next on the interplay between judgments and punitive damages. In Alabama, punitive damages are meant to punish a defendant for his culpable conduct and to deter others similarly situated from engaging in similarly culpable conduct. Punitive damages are assessed by a jury based on the enormity of the wrong committed.[15] Again, this Court has recognized a paramount concern with insuring that a defendant is punished no more than what is fair under the law. *Industrial Chem. & Fiber. Corp. v. Chandler*, 547 So. 2d 812, 837 (Ala. 1988).

Taking together the procedural law of judgments and the law of punitive damages, this Court must accept that the right to due process guaranteed Sears and State Industries embraces the notion that the judgment of the trial court must fairly and accurately apprise the defendants of the extent of punishment imposed for the acts found by the jury to be wrongful. The judgment entered below fails to do so.

The jury assessed punitive damages against the defendants for a single wrongful act—the selling of a defective product. Because the jury apparently found wantonness in the personal injury claims, and because one of the claims was for wrongful death, the trial court submitted to the jury the issue of punitive damages. Specifically, the trial judge charged the jury regarding punishment that could be imposed on the wrongful death claim, (R. 1211-1222) and that punishment could be im-

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[15] *City Bank of Alabama v. Eskridge*, 521 So.2d 931, 933 (Ala. 1988); *Alabama Power Co. v. Rembert*, 282 Ala. 5, 6, 208 So.2d 205 (1968); *Treadwell Ford, Inc. v. Leek*, 272 Ala. 544, 546, 133 So. 2d 24 (1961); *Birmingham Elec. Co. v. Shephard*, 215 Ala. 316, 318, 110 So. 604 (1926); *Cox v. Birmingham Ry. Light & Power Co.*, 163 Ala. 170, 50 So. 975, 976 (1909).

posed on the personal injury claims if the jury found wantonness. (R. 1233, 1237-1239) "The amount of damages should be directly related to the amount of wrong doing on the part of the defendant." (R. 1221)

What the jury did next by way of its verdict was to say that the conduct of the defendants merited punishment; the jury then assessed the enormity of the wrong as being suitable to $4,000,000.00 in punishment. Or $1,000,000.00 in punishment. Or $250,000.00 in punishment.

In other words, the defendants were presumably guilty of a single wrongful act, but the verdict of the jury upon which the trial court entered judgment assessed punishment in differing amounts. The defendants thus have no way of knowing whether the judgment punishes them to the extent of $4,000,000.00, *or* $1,000,000.00, *or* $250,000.00. The collective total of the punitive damages portion of the judgment is $6,500,000.00, but the jury did not assess $6,500,000.00 as an amount appropriate to punish the defendants in light of the enormity of the wrong done; that number appeared nowhere on the verdict, nowhere in the judgment, and nowhere in the record.

As is obvious, the jury apparently attempted to issue punitive damages verdicts to each plaintiff in an amount that bore some type of proportionality to the amount of compensatory damages awarded. While that may not seem problematic, this Court has rejected the notion that punitive damages must bear a proportional relationship to compensatory damages, *Associates Fin. Serv. Co. of Ala., Inc. v. Barbour*, 592 So. 2d 191, 199 (Ala. 1991), and that fact also underscores the jury's misperception that its focus in awarding punitive damages should have been on factors other than the enormity of the wrong done by the defendants.

A judgment that fails to apprise defendants specifically of what has been determined—here, the enormity of the wrong done—is invalid. *Jewell*, 331 So. 2d at 625. In this case, the jury was to decide the enormity of the wrong

done by Sears and State Industries and assess punitive damages accordingly; because the judgment entered by the trial court does not reflect that that was properly done, the judgment was entered in error. *Ramer v. Fletcher, supra.* For the foregoing reasons, the defendants have no way of knowing the extent of punishment imposed upon them for the single wrongful act of selling a defective product. The judgment offers three possibilities ($1,000,000.00 or $4,000,000.00 or $250,000.00) each distinct, none certain or definite. As such, the rights to procedural due process of the defendants, as guaranteed by the longstanding law of this State, have been violated. The judgment should be reversed and this case remanded for a new trial.

B. THE DUE PROCESS CLAUSE PROHIBITS REPEATED PUNISHMENTS FOR A SINGLE WRONGFUL ACT.

The two tenets most basic to the administration of justice are evenhandedness and regularity in the law. *Kolender v. Lawson,* 461 U.S. 352, 357-358 (1983); *Smith v. Goguen,* 415 U.S. 566, 574 (1974). The Double Jeopardy Clause itself, even if primarily associated with the criminal law, still well "serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should certainly be followed by one appropriate punishment and no more." *Taber v. Hutson,* 5 Ind. 322, 325-326 (1854).

Again, it must be emphasized that the judgment of the trial court imposes punishment five times for what the jury believed to be a single culpable sale. The defendants were punished to the extent of $4,000,000.00 for that one sale on the claim of Joyce Simpson, to the extent of $1,000,000.00 for the same sale on the claim of Felicia Diane Simpson, to the extent of $1,000,000.00 for the same sale on the claim of Louisiana Waddell, to the extent of $250,000.00 for the same sale on the claim of Janice Denise Simpson, and to the extent of $250,000.00 for the same sale on the claim of Ruth McCord.

It bears remembering that the concept of fault was retained under the AEMLD, and that the fault lies with the *selling* of a product in a defective condition or without adequate warning. There is but a single sale involved in this case, and yet the judgment of the trial court authorizes five punishments with a collective total of $6,500,000.00. Permitting those multiple punishments for the sale of a single product violates the evenhandedness and regularity required by the Due Process Clause.

In accepting that the Due Process Clause prohibited the imposition of multiple awards of punitive damages for a single episode of culpable conduct, Judge Sarokin has written that:

> Punitive damages are, by their nature and purpose, a form of punishment imposed in civil actions. However relevant the distinction between criminal, "quasi-criminal", and civil actions might be to the protections provided by the Eighth Amendment and the Double Jeopardy Clause of the Fifth Amendment, such distinctions are irrelevant under the Due Process Clause of the Fourteenth Amendment .... The Due Process Clause of the Fourteenth Amendment requires that adjudicatory proceedings be fundamentally fair, whether those proceedings be in a criminal or civil context.

Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1060 (D.N.J. 1989), *vacated in part on other grounds*, 718 F. Supp. 1233, 1236 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause . . .").

Twenty-five years ago, Judge Friendly predicted that repetitive punitive damages awards for a single course of conduct in mass tort litigation could effectively reach astronomical amounts. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). Judge Friendly continued his exposition by warning that, unless such awards were re-

stricted to some fixed or measurable amount, the cumulative effect of repeated punishment would amount to a violation of the due process rights of manufacturers. *See also Juzwin,* 705 F.Supp at 1062 n.7.[16]

As Judge Sarokin noted, "[d]ue process requires more than simply the provision of a judicial proceeding. It requires that any such proceeding be fundamentally fair, and this court concludes that subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause." *Juzwin,* 705 F. Supp. at 1064.

Several other federal courts have also expressed extreme dissatisfaction with the unfairness inherent in repeatedly punishing manufacturers for a single culpable act. *E.g., In re School Asbestos Litigation,* 789 F.2d 996, 1005 (3d Cir.), *cert. denied,* 479 U.S. 852 (1986) ("powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts"); *In re Federal Skywalk Cases,* 680 F.2d 1175, 1188 (8th Cir.), *cert. denied,* 459 U.S. 988 (1982) (Heaney, J., dissenting) ("Unlimited multiple punishments for the same act determined in a succession of individual lawsuits and bearing no relation to the defendant's culpability or the actual injuries suffered by victims would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *In re "Agent Orange" Product Liability Liti-*

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[16] Several commentators have recognized the identical problem for years. *See, e..g.,* Jeffries, *A Comment on the Constitutionality of Punitive Damages,* 72 Va. L. Rev. 139, 147 (1986) (requirement of fundamental fairness inherent in concept of due process cannot be construed to permit unlimited multiple awards of punitive damages for single course of conduct); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products,* 49 U. Chi. L. Rev. 1, 50 (1982) (increased judicial control is necessary to prevent violation of manufacturer's due process rights through excessive punishment resulting from multiple awards for a single product mistake).

gation, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984) ("There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*, 526 F. Supp. 887, 899-900 (N.D.Cal. 1981), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983) ("A defendant has a due process right to be protected against unlimited multiple punishments for the same act . . . simply because overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process.").

Several state courts likewise have agreed that successive civil punishments for the same act violate basic principles of fairness and, thus, due process of law. *E.g.*, *Stoner v. Houston*, 582 S.W.2d 28, 31 (Ark. 1979); *Troensegaard v. Silvercrest Industries, Inc.*, 175 Cal. App. 3d 218, 220 Cal. Rptr. 712, 717-18 (Cal. 1st DCA 1985); *Bill Terry's, Inc. v. Atlantic Motor Sales*, 409 So. 2d 507, 509 (Fla. 1st DCA 1982); *Bjorgen v. Kinsey*, 466 N.W. 2d 553, 561-62 (N.D. 1991); *His World, Inc. v. Cleto M., Inc*, 378 A.2d 943, 947 (Pa. Super. 1977); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 198 N.W.2d 363, 367 (1972) (multiple punishments "violate the basic fairness of a judicial proceeding required by the due process clause of the Fourteenth Amendment to the federal constitution"); *see generally* 22 Am. Jur. 2d *Damages* § 817 (1988).

While it may be conceded that several courts have resolved themselves to be powerless to protect manufacturers from the due process violation that occurs by the repeated imposition of punitive damages awards for a single wrongful act, the procedural and legal posture of this case provide this Court with a perfect opportunity to insure that the due process rights of Sears and State Industries will be protected. Usually, the due process issue raised herein has been argued by asbestos manufacturers fighting punitive damages in thousands of lawsuits

throughout the county. *E.g., Juzwin, supra.* But the concerns that attend those other courts are not present here.

Some courts facing this issue have been troubled by the fact that punitive damages practice varies state by state, and by the fact that punitive damages are disallowed or capped in some states. *See Juzwin,* 718 F. Supp. at 1235-1236. Some courts have spoken in terms of a concern with multiple plaintiffs' *rights* to punitive damages; even Judge Sarokin mentioned as much. *Juzwin,* 705 F. Supp. at 1064. Other courts have lamented the lack of an adequate record, or expressed concern at the propriety of judging the conduct of an manufacturer in successive cases where information concerning product design came to the attention of the manufacturer at different points in time. *See Simpson v. Pittsburgh Corning Corp.,* 901 F.2d 277, 281 (2d Cir. 1990). None of those arguments are availing here, however.

As a matter of first importance, what is advocated in this case is a *single punishment for the sale of a single product,* consistent with the confines of the AEMLD. For example, if this case involved a Ford Pinto, then the argument would be that the sale of a single Ford Pinto could give rise to a single award of punitive damages upon proper proof. Because the AEMLD focuses on culpability involved with selling *a* product in a defective condition, the argument presented differs from that pressed by the asbestos manufacturers in other cases. Rather than arguing in favor of a single punitive damages award arising from the single design of millions of Ford Pintos, the argument here focuses on the fact of a single sale of one product.

Second, the concern about the multi-jurisdictional inconsistencies of punitive damages practice is avoided under this approach; if only a single punishment is allowed for a single product, such as here, there can be no doubt but that the injuries occasioned by the gas water heater will all be redressed in Alabama. There will not be plaintiffs filing lawsuits in California, New Jersey, Florida, Ohio, and Alabama. Thus, under the approach suggested, the

procedural quagmire of inconsistent and varying punitive damages standards among the several states is avoided.

As to the status of the record, the amount of punitive damages awarded for the single sale are all part of the same judgment. All five punishments are properly before this Court. There is not a concern here with appropriate evidence of judgments from other jurisdictions, or satisfaction of foreign judgments for punitive damages. The record is complete, and application of the "one punishment for one sale" rule makes generally certain that the concern with a sufficient record will not become manifest.

Finally, as to the concern of some courts that such a rule might infringe upon a plaintiff's *right* to punitive damages, under Alabama law, the concern is of absolutely no moment. This Court has repeatedly held throughout its history that a plaintiff has no right to punitive damages.[17] It is the office of compensatory damages to provide a remedy, and our state constitution guarantees the right to sue for and receive remedial damages. Ala. Const. of 1901 § 13. But there is no right to receive punitive damages, whether the action brought is for personal injury or wrongful death.

The argument presented does not advocate the abolition of punitive damages. This Court, and virtually every other,

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[17] *See e.g. City Bank of Alabama v. Eskridge*, 521 So.2d 931, 933 (Ala. 1988) ("Punitive damages are not awarded because the injured party is entitled to them as a matter of right . . . ."); *Alabama Power Co. v. Rembert*, 282 Ala. 5, 6, 208 So.2d 205 (1968) ("Punitive damages are not recoverable as a matter of right except as provided by statute . . . ."); *Treadwell Ford, Inc. v. Leek*, 272 Ala. 544, 546, 133 So.2d 24 (1961) ("Punitive damages are not recoverable as a matter of right except as provided by statute."); *Birmingham Elec. Co. v. Shephard*, 215 Ala. 316, 318, 110 So. 604 (1926) ("The cases hold that punitive damages are not recoverable as matter of right . . . ."); *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775, 777-78 (1910) ("A plaintiff has no right to maintain an action merely to inflict punishment. Exemplary damages are in no case a right of the plaintiff . . . ."); *Cox v. Birmingham Ry. Light & Power Co.*, 163 Ala. 170, 50 So. 975, 976 (1909) ("Punitive damages, being apart from compensation, are not recoverable as a matter of right.")

has accepted that punitive damages do have a purpose in civil litigation. What is advocated is fairness—a single punishment for a single wrongful act. That rule is consistent both with the AEMLD, and with this Court's longstanding recognition that no plaintiff has a right to receive punitive damages. And, reflexively, this Court has repeatedly recognized that a defendant in a civil case has a constitutional *right* to be punished fairly, and, that in assessing punitive damages and considering their excessiveness, the focus is solely and exclusively upon the nature or character of the conduct at issue. *E.g., Industrial Chemical,* 547 So. 2d at 818-19 n.1.

What is involved in this case, insofar as what the jury apparently accepted, is the single sale of a defective water heater. It can not be held, consistent with any notion of fundamental fairness, that the trial court properly entered judgment on a jury verdict that punishes the defendants for that single sale to the extent of $4,000,000.00—and $1,000,000.00 and $1,000,000.00 more, and $250,000.00 more, and $250,000.00 more.

In summary:

> A defendant has a due process right to be protected against multiple punishments for the same act. A defendant in a civil action has a right to be protected against recoveries not because they violate "double jeopardy" but simply because overlapping damage awards violate that sense of "fundamental fairness" which lies at the heart of constitutional due process. Certainly the principle of *res judicata,* the notion that litigation must come to an end, that a party cannot sue or be sued repeatedly on the same cause of action, is a part of the process that is due under our constitutional system.
>
> Our law of punitive damage was created in an era of single plaintiff versus single defendant disputes and has not yet been adapted to the complexity of multi-party litigation. *Common sense*

> *dictates that a defendant should not be subjected to multiple civil punishments for a single act or verified course of conduct which causes injury to multiple plaintiffs.*

In re Northern Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 899-900 (N.D. Cal. 1981), *vacated on other grounds,* 693 F.2d 847 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983) (emphasis added).

Accordingly, the judgment of the trial court should be reversed and this case remanded for a new trial.

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No. 93-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,
v.
ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court properly determined that petitioners had waived any constitutional challenge to the separate and unequal awards of punitive damages given to the five plaintiffs in this case, based on the fact that petitioners had proposed verdict forms inviting such awards.

2. Whether the Alabama courts properly applied the state-law standards and procedures approved by this Court as constitutionally sufficient in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), in the particular factual circumstances of this case.

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT

In this products liability action filed in Alabama state court, the five respondents sought damages for injuries and one death resulting from a discharge of carbon monoxide from a gas water heater in a mobile home. It was undisputed that the water heater was improperly installed, in that it lacked a vent pipe and was connected to a source of liquid propane rather than natural gas. The jury, however, ultimately concluded that the accident was also caused by petitioners' negligent or wanton conduct in producing an unreasonably dangerous product. Specifically, respondents' evidence at trial showed that industry standards required that "an installation and instruction manual be permanently attached to the water heater," Pet. App. 71a, rather than placed in a pouch

taped to the water heater that could, as here, be lost. The evidence also showed that carbon monoxide sensors or shut-off devices were commercially available but were not included with this water heater, and that the labelling on the water heater failed to instruct users to vent it and to connect it only to natural gas.

The jury awarded $4 million to the estate of the decedent on the wrongful death claim, $3 million ($2 million in compensatory damages and $1 million in punitive damages) to each of two other plaintiffs, and $1 million ($750,000 in compensatory damages and $250,000 in punitive damages) to each of the final two plaintiffs. These verdicts were upheld by the trial court in an opinion that carefully analyzed the evidence establishing liability as well as the relevant factors justifying the award of punitive damages. Pet. App. 47a-64a.

On appeal, the Alabama Supreme Court agreed that the evidence supported petitioners' liability, but ordered remittiturs with respect to the compensatory damages awarded to the four living plaintiffs, reducing those damages from $5.5 million to $850,000. The court went on to review the $2.5 million in punitive damages awarded to the four living plaintiffs, as well as the $4 million awarded on the wrongful death claim.[1] The court did not order a remittitur with respect to punitive damages.

In the portion of its opinion determining that the punitive damages were not excessive, the Alabama Supreme Court applied the state-law standards approved by this Court as constitutionally sufficient in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Pet. App. 96a (discussing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). After "thoroughly reviewing the evidence

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[1] Under Alabama law, there is no compensatory relief in wrongful death cases; the sole relief is in the form of punitive damages. *See Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989).

in this case," the court concluded that $6.5 million in punitive damages did not exceed "the amount necessary to accomplish society's goals of punishment and deterrence." Pet. App. 96a. It reasoned that petitioners had specifically designed their water heater to allow users to install it and had thereby incurred a "legal duty to anticipate reasonably foreseeable ways in which consumers would misinstall their product and injure themselves and to change its design to eliminate the risks associated with such misuses or to adequately warn consumers of those risks." *Ibid.* It noted the proof that petitioners were aware that consumers were injuring and killing themselves by misinstalling their gas water heaters but "did nothing to alter the design or labelling of their product." Taking into account the "reprehensibility of [petitioners'] wanton conduct and the extreme risk of injury or death that conduct created," *ibid.*, as well as the magnitude of punitive awards in other comparable cases, *id.* at 96a-97a, the court saw no reason to conclude that the damages here were excessive.

In their appeal, in addition to arguing excessiveness under state law, petitioners had raised two federal constitutional challenges to the punitive damage awards. They contended that these awards violated the Due Process Clause because (1) they imposed multiple penalties for a single tort, and (2) those penalties were disparate in amount. Pet. App. 92a, 113a. The Alabama Supreme Court, however, refused to reach the merits of these contentions. It did so because it found that petitioners had "requested special verdict forms, materially similar to the ones eventually submitted to the jury, asking the jury to return separate awards of punitive damages for each plaintiff." Pet. App. 92a-93a. It concluded that such jury forms "invited" the jury to return multiple and different awards of punitive damages, and held that petitioners "cannot now on appeal base an argument for reversal on alleged error that they themselves invited." Pet. App. 93a (citing cases).

Petitioners sought rehearing, arguing *inter alia* that the affirmance of widely disparate punitive damage awards could not be squared with the requirements of *Haslip*. Pet. App. 41a-46a. The Alabama Supreme Court made an unrelated modification in its opinion, but otherwise denied rehearing.

ARGUMENT

Although petitioners have asked the Court to review a single "question presented," that question combines two quite distinct constitutional claims. When these two claims are identified and separately analyzed, it becomes clear that neither warrants review in this Court. First, to the extent that petitioners are complaining about the fact that the jury awarded separate and different amounts of punitive damages to the five plaintiffs, that claim is not available for review because it was properly treated as waived in the Alabama Supreme Court. In any event, there is no reason to conclude that the claim raises a substantial constitutional issue—much less an issue of general concern outside this fact-specific context. Petitioners also seem to complain about the Alabama Supreme Court's affirmance of a total punitive award of $6.5 million, suggesting that the approval of this total award is representative of the Alabama Supreme Court's alleged mishandling of punitive damages cases since *Haslip*. But they offer little or nothing to support the notion that $6.5 million was constitutionally excessive in this case. Nor have they established the existence of some more general problem in Alabama's post-*Haslip* case law —let alone explained how a Supreme Court ruling in this case would add anything to what the Court has already decided in *Haslip* and *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).

1. As noted above, petitioners in the Supreme Court of Alabama drew a clear distinction between their arguments focusing on the jury's multiple and diverse punitive awards and their general attack on the total punitive

damages as excessive. The former arguments were presented in the constitutional section of petitioners' principal brief, which asserted that petitioners had been denied due process because they had been subjected to "repeated" punishments for the same tort and had not received clear notice about the amount of punishment that the jury deemed appropriate for that tort. Pet. App. 113a-17a.[2] The Alabama Supreme Court, in turn, addressed these two specific arguments in the "due process" section of its opinion,[3] holding that they had been waived because petitioners had "invited" any error by proposing verdict forms that asked the jury to return separate awards of punitive damages for each plaintiff. Pet. App. 92a-93a.

This ruling of the Alabama Supreme Court plainly constitutes an independent and adequate state ground for affirmance with respect to any constitutional argument that the jury should have been required to return only one award of punitive damages (or five identical awards) in this case brought by five separate plaintiffs. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) ("Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965). *See also TXO Prod. Corp.*, 113 S. Ct. at 2723-

[2] Petitioners made it clear that they considered these arguments to be distinct from the usual constitutional excessiveness claim, asserting that they were presenting "constitutional challenges never previously addressed in Alabama." Pet. App. 113a.

[3] Pet. App. 92a ("The two issues they raise are (1) whether the trial court's judgment violates the due process rights of the defendants on the basis that it does not apprise them of the extent of the punishment imposed for their conduct, and (2) whether the trial court's judgment violates the due process rights of the defendants by meting out multiple and differing punishments for a single wrongful act.").

24 (plurality opinion of Stevens, J.). Petitioners in this Court do not dispute the *factual* basis of the court's ruling—*i.e.*, the assertion that they proposed verdict forms "materially similar" to the ones used in the trial court.[4] Moreover, the Alabama Supreme Court was certainly correct in determining that such verdict forms, with separate blank spaces for punitive damages that could be awarded to each of five plaintiffs, constituted an "invitation" to award such damages five times and in varying amounts. After all, the forms only make sense if the jury was left with the discretion to award punitive damages to more than one plaintiff and to vary the amounts. Indeed, petitioners themselves argued in their post-trial motion that the "procedures" used had "encourage[d]" the imposition of multiple and varying penalties. Pet. App. 109a.[5]

Nor is there any indication that application of the "invited error" doctrine in this case was some sort of subterfuge to avoid reaching a federal claim. Petitioners suggest that the doctrine constitutes a " 'novelty in procedural requirements' " designed to " 'thwart review in this Court.' " Pet. 10 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958)). But the reality is that the "invited error" rule has been applied in the Ala-

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[4] In their rehearing petition in the Alabama Supreme Court, petitioners denied that they had proposed such verdict forms. Pet. App. 39a-41a. Petitioners have now abandoned this basis for attacking the ruling of the Alabama Supreme Court, apparently recognizing that this factual issue would never warrant Supreme Court review and/or that it is irrelevant because it is *undisputed* that petitioners never objected to the verdict forms actually used.

[5] It is no answer for petitioners to assert that they raised other, more general constitutional issues in the trial court and raised these specific concerns on appeal. *See* Pet. 7-8. Under the applicable state procedural rule, they waived this claim when they proposed the verdict forms and allowed the jury to decide the case using "materially similar" forms. Indeed, even if they had not proposed comparable forms, their failure to object to the forms actually given to the jury would have been sufficient to waive any later attack on the jury's decision to return multiple, disparate punitive verdicts.

bama Supreme Court (and presumably every other court in this country) for many years.[6] Petitioners also suggest that the application of the doctrine in the court below constituted "discrimination" against federal claims because, in one previous case, the court reached a state constitutional issue that the parties had not brought up. Pet. 9-10 (citing *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991)). But *Armstrong* did not involve "invited error" at all. Moreover, the state constitutional issue that the court chose to reach was a separation-of-powers question that had to be resolved on appeal, even if not raised by the parties, since it affected the court's own decisionmaking process in that case. *See id.* at 416. Nothing of the sort is present here. In any event, one case can hardly establish a pattern of discrimination against federal claims.

In sum, to the extent that plaintiffs' claims are based on the fact that the jury divided the punitive damages into five unequal amounts, that issue was not addressed on the merits by the Alabama Supreme Court, and its reasons for not doing so were entirely proper. There is no reason for this Court to consider addressing the issue.

2. Even if there were no waiver problem, there still would be no reason for this Court to review the question whether the jury was properly allowed to return varying punitive damages awards for each of the five plaintiffs. To begin with, petitioners have made no showing that this particular question is one that arises frequently or has created confusion in the lower courts. Indeed, they cite not a single case dealing with awards to multiple plaintiffs.

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[6] *See* Pet. App. 93a (citing Alabama cases); *Henry v. Mississippi*, 379 U.S. at 451 ("[B]y delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal."); 36 C.J.S. *Federal Courts* § 201(13)(h) (1960) ("A party on appeal will not be permitted to take advantage of errors which he himself invited or induced the trial court to commit . . . .") (citing cases).

On the merits, moreover, there is little reason for concern about the constitutionality of the jury's verdicts. Petitioners act, first of all, as if it were obvious that these verdicts constituted separate and redundant penalties. But since they were returned simultaneously by a single jury, there is every reason to conclude that the jury viewed the matter globally, determining that—given the nature of the conduct and the harm that it threatened (and, in fact, caused)—a total award of $6.5 million in punitive damages was appropriate in this case. If the five plaintiffs had proceeded in separate courts, it is perhaps conceivable that petitioners might have been faced with redundant punishments. The fact that the suits were tried simultaneously before a single jury, far from creating unconstitutional duplication, significantly enhanced petitioners' chances of avoiding that result.

Petitioners also assert that it was irrational for the jury to punish them in different amounts for the same act. But what the jury actually did was to allocate the $6.5 million to reflect the extent of the injury incurred by each plaintiff—awarding $4 million to the estate of the decedent, $1 million to each of two other plaintiffs who received higher compensatory damages, and $250,000 to the final two plaintiffs who received the smallest compensatory awards.[7] Petitioners themselves expressly advocate a linkage between punitive damages and the "harm" done to the plaintiff. Pet. 15. Having done so, they can hardly claim that it violated the Constitution for the jury to adopt precisely the same approach.

3. Petitioners also contend that the total amount of punitive damages in this case is excessive and was not properly reviewed by the Alabama Supreme Court. It is at least debatable whether this constitutional issue was

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[7] Allocation of the bulk of the punitive damages to the wrongful death claim was especially appropriate since, in Alabama, this is the *only* type of damages available in a wrongful death case. *See* note 1 *supra*.

properly preserved in the courts below.[8] In any event, it hardly provides a convincing basis for a grant of review. Petitioners are making essentially the same argument that is made by defendants in every punitive damages case—that a given award is too large, taking into account the nature of the tort, the extent of the injury, the financial impact on the defendants, and other factors. But beyond making that bald assertion, they offer little in the way of reasons why Supreme Court review of that issue in this case is warranted.

The problem, from petitioners' point of view, is that this Court has already affirmed the constitutionality of the Alabama *system* for awarding and reviewing punitive damages, in *Haslip*. As a result, petitioners are left with an argument that the Court should review the *application* of the Alabama standards and procedures in this case. Petitioners then attempt to transform that fact-specific question into a matter of general import by asserting that this case is typical of a supposed pattern of abuse by the Alabama Supreme Court.

But this effort is unavailing. To begin with, petitioners have presented *no* evidence that the Alabama system for reviewing punitive damage awards is malfunctioning. They include a long list of substantial jury *verdicts* (most of which were not appealed, have appeals pending, or were reduced in post-trial settlements), but that hardly shows a problem with the *review* system. Petitioners go

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[8] In their appeal to the Alabama Supreme Court, petitioners argued the overall excessiveness issue only as a matter of state law, in a section of their brief separate from the due process section. *See* p. 3 *supra*; Pet. App. 113a-24a; Appellants' Brief in the Ala. Sup. Ct. at 149-63. The Alabama Supreme Court discussed the issue only with reference to state law. Pet. App. 95a-97a. On rehearing, petitioners' constitutional arguments again focused entirely on the fact that the Alabama Supreme Court had affirmed five different awards of punitive damages arising from a single tort. Pet. App. 41a-46a. The rehearing petition did not appear to argue that a total award of $6.5 million was constitutionally excessive.

on to say that it is "rare," Pet. 16, for the Alabama Supreme Court to reduce a punitive damage award, describing the " 'presumption of correctness' accorded to jury verdicts" as "virtually unrebuttable" once a case reaches that court, Pet. 14-15. In fact, however, by our count, they cite only seven post-*Haslip* cases in which the Alabama Supreme Court affirmed previously unreduced jury awards of punitive damages, Pet. 13 n.8, 14 & n.10, 15 n.11, while citing four cases where the court ordered substantial remittiturs, Pet. 16 n.13.[9] As in any other legal context, the fact that a majority of appeals lead to affirmances is neither surprising nor an indication that the appellate process is no longer "meaningful," Pet. 11.

Perhaps most importantly, petitioners fail to suggest any reason why review by this Court in this case would itself be "meaningful." This Court has already analyzed more than once the extent to which the Due Process Clause imposes an outer limit on the magnitude of the punitive damages that may be awarded in a given case. *See TXO Prod. Corp.*, 113 S. Ct. at 2718-23 (plurality opinion); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. at 1038-39. *See also Honda Motor Co. v. Oberg*,

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[9] In two other cases cited by petitioners, *Southern Life & Health Ins. Co. v. Turner*, 586 So. 2d 854, 858 (Ala. 1991), and *Intercontinental Life Ins. Co. v. Lindblom*, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992), *see* Pet. 15, the Alabama Supreme Court did reinstate punitive damage awards after its original decisions had been remanded for reconsideration in light of *Haslip*. In *Southern Life*, however, the trial court had already reduced a jury award of $5 million in punitive damages to $500,000. *See* 586 So. 2d at 856. And in *Intercontinental Life*, the Alabama Supreme Court had itself already reduced the punitive damages from over $3 million to $1 million. *See Intercontinental Life Ins. Co. v. Lindblom*, 571 So. 2d 1092, 1100 (Ala. 1990), *vacated*, 499 U.S. 956 (1991), *reinstated*, 598 So. 2d 886 (Ala.), *cert. denied*, 113 S. Ct. 200 (1992). Petitioners also cite three cases in which the sole issue was whether relatively modest awards of punitive damages were barred because the jury had failed to award compensatory relief. Pet. 15 & n.12. These cases are largely irrelevant here.

cert. granted, 114 S. Ct. 751 (1994).[10] Petitioners have suggested no new review procedure that they believe to be constitutionally mandated. Nor have they offered some new standard for determining whether a given punitive award—like the $6.5 million awarded in this case—crosses the constitutional line.[11] As a result, there is little reason to think that a grant of review in this case would lead to anything more than an application of accepted principles to an unremarkable, and very specific, set of factual circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[10] Because this Court approved the Alabama review system in *Haslip*, and the *Honda Motor Co.* case deals with the constitutionality of a system that provides *less* appellate review of punitive damage awards, there would appear to be no reason to hold this case pending the outcome of *Honda Motor Co.*

[11] Such a determination would be particularly problematic here where $4 million of the $6.5 million constituted the sole relief provided on the wrongful death claim. *See* note 1 *supra*.

SUPREME COURT, U.S.
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No. 93-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SEARS ROEBUCK AND COMPANY
and STATE INDUSTRIES, INC.,
Petitioners,

v.

ANNIE HARRIS, as administratrix
of the estate of JOYCE SIMPSON, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

REPLY MEMORANDUM

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REPLY MEMORANDUM

Respondents have misconstrued the question presented, enabling them to focus almost entirely on a non-issue. They purport to discern from the petition for certiorari "two quite distinct constitutional claims," one "complaining that the jury awarded five separate and different amounts of punitive damages to the five plaintiffs" and the other addressed to "the Alabama Supreme Court's affirmance of a total punitive damage award of $6.5 million." Opp. at 4-5. But the single, fundamentally important question presented here is not whether these particular punitive damage awards—either separately or in the aggregate—exceed substantive limits on punitive damage awards. Rather, petitioners challenge the Alabama post-verdict *procedures* for inflicting punitive damages as applied in this case and in the multitude of other cases since this Court approved the Alabama punitive damage system in *Pacific Mutual Life Insurance Co.* v. *Haslip,* 499 U.S. 1 (1991).

In *Haslip,* this Court perceived Alabama's punitive damage system as including constitutionally sufficient protections against arbitrary and fundamentally unfair punishments, emphasizing its belief that the Alabama post-verdict review procedures constitute a "meaningful and adequate" restraint on the standardless discretion of juries to assess unlimited punishment.[1] However, as this case illustrates, "[p]ost-

[1] "The very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they

Haslip reviews by the [Supreme Court of Alabama] . . . indicate that the procedures, when applied, are not adequate and meaningful." *Intercontinental Life Ins. Co.* v. *Lindblom*, 598 So. 2d 886, 892 n.4 (Ala.) (Maddox, J., dissenting), *cert. denied*, 113 S. Ct. 200 (1992).

Although this Court in *Haslip* was under the impression that the Alabama Supreme Court had developed "detailed substantive standards . . . for evaluating punitive awards," 499 U.S. at 21, it has now become brutally apparent that the reality is quite different. Even members of Alabama's highest court have come to acknowledge that their system is utterly standardless. As Justice Houston explained with respect to the $4,000,000 punitive damage award for the wrongful death claim in this case, there is

> no standard by which to determine whether a wrongful death award is excessive or inadequate. It is not excessive or inadequate if five members of this Court hold that it is not excessive or inadequate; it is excessive or inadequate if five members of this Court hold that it is excessive or inadequate.

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share key characteristics of criminal sanctions." *Landgraf* v. *USI Film Products*, No. 92-757, slip op. at 37 (U.S. Apr. 26, 1994). However, "[u]nlike criminal penalties, . . . punitive damages are not awarded within discernible limits." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting). The lack of any legislatively established "range of penalties as to which responsible officials had deliberated and then agreed" requires that the courts "look longer and harder" at punitive damage awards than other types of monetary punishments, which "fall within statutory limits." *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring).

Pet. App. 101a (Houston, J., concurring and dissenting).

Respondents maintain that petitioners "have presented *no* evidence that the Alabama system for reviewing punitive damage awards is malfunctioning" or that there is a "problem with the *review* system." Opp. at 9 (emphasis in original). But the evidence is everywhere. While acknowledging that "a majority of appeals lead to affirmances," respondents hail four decisions in which remittitur was ordered as proof that the Alabama Supreme Court engages in meaningful review of punitive damages. Opp. at 10. Yet, these cases contain the very evidence that respondents cannot see. There is no consistent standard of review that can be discerned from those cases other than the fact that the Alabama Supreme Court occasionally decides arbitrarily to reduce a punitive damage award by precisely 50%. Pet. at 16 n.13.

Illustrative of the Alabama Supreme Court's approach is *Northwest Mut. Life Ins. Co.* v. *Sheridan*, 630 So. 2d 384 (Ala. 1993), in which the court stated that it had "independently reviewed the evidence presented in this case," block-quoted the *Haslip* factors and then reduced the punitive damage award with mathematical precision from $25,727,248 to $12,863,624, exactly in half, without explaining how any of the *Haslip* factors could yield that result. *Id.* at 394-95. While the outcome in *Sheridan* and the other cases mentioned by respondents certainly constituted a reduced outrage, that hardly demonstrates that the *procedure* used by the Alabama Supreme Court to review punitive damage awards is applied in a constitutionally rational manner. Nor does it even come close to demonstrating that the resulting pun-

ishments in such cases bear any intelligible relationship to the alleged wrongful conduct that occurred or the harm caused. And, of course, these cases address only a small fraction of the massive punitive damage verdicts that have been returned by Alabama juries in the three years since *Haslip*.

Respondents do acknowledge the "long list of substantial jury *verdicts*" awarding punitive damages in Alabama since *Haslip*,[2] but assert that "most" of these cases "were not appealed, have appeals pending, or were reduced in post-trial settlements." Opp. at 9 (emphasis in original). Thus, according to respondents, these cases "hardly show[ ] a problem with the *review* system." *Id.* (emphasis in original). Respondents' dismissal of those cases, however, misses the point, which is that the avalanche of multimillion dollar punitive damage verdicts in Alabama demonstrates the urgency of the crisis in Alabama and underscores the importance of this Court ad-

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[2] The punitive damage binge continues at a breathtaking pace in the Alabama courts. In the four and one-half weeks since the petition was filed, Alabama juries have racked up $40 million in punitive damages. *See Clark* v. *Performance Toyota, Inc.*, No. CV-92-2437-BLK (Mobile County, Ala. Cir. Ct. Apr. 20, 1994) ($10 million in punitive damages in wrongful death action); *Whittington* v. *Waste Management of Ala.*, No. CV-93-77-RTC (Mobile County, Ala. Cir. Ct. Apr. 8, 1994) ($5 million punitive damage verdict in environmental case where $86,000 in compensatory damages were awarded; post-trial motion pending); *Gallant* v. *Prudential Ins. Co.*, No. CV-93-50 (Barbour County, Ala. Cir. Ct. Apr. 6, 1994) (two punitive damage verdicts against insurance company -- one for $7.5 million and one for $17.5 million—for alleged misrepresentations by insurance agent where plaintiffs allegedly suffered, at most, $600 in out-of-pocket loss; post-trial motions pending).

dressing the constitutional infirmities of the Alabama system.

Respondents urge that the Court keep sealed the door slammed shut by *Haslip* because it "has already affirmed the constitutionality of the Alabama *system*," making this case both "fact-specific" and "unremarkable." Opp. at 9, 11 (emphasis in original). But since *Haslip*, state and federal courts across the Nation have considered the Alabama system to be some kind of benchmark against which to measure the constitutionality of punitive damage schemes, *see* Pet. at 21-22, so a review of the system approved in *Haslip* would be extremely useful and provide urgently needed guidance. Although *Haslip* emphasized the need for a meaningful judicial "check . . . on the jury's discretion," 499 U.S. at 20-21, it did not articulate what standard of post-verdict review the Due Process Clause requires. Various Members of the Court expressed concern about this issue at the time *Haslip* was decided, *id.* at 39 (Scalia, J., concurring in judgment); *id.* at 64 (O'Connor, J., dissenting), and, more recently, throughout the oral argument in *Honda Motor Corp.* v. *Oberg*, 93-644, *cert. granted*, 114 S. Ct. 571 (1994) (argued Apr. 20, 1994).[3] This case is a timely and appropriate vehicle for resolving this important question.

There are ample objective indicia that the post-verdict review of the punitive damage awards in this case was constitutionally inadequate. As Justice Houston recognized, there is no justifiable basis for permitting five widely varying punitive damage awards to stand when each was intended to punish the same

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[3] *See* Transcript in No. 93-644, at 3-9, 11, 15-16, 18-21.

act. *See* Pet. App. 101a. Respondents defend the substantial disparity of the respective punitive awards on the ground that this disparity was intended "to reflect the extent of the injury incurred by each plaintiff." Opp. at 8. But that cannot be the case because the court below affirmed all of the punitive damage judgments even as it substantially reduced each of the compensatory awards, including the $750,000 jury award to Mrs. McCord—which the court reduced to $1.[4]

Finally, although respondents argue that petitioners waived any challenge to the size or arbitrariness of the punitive damage awards by failing to object to

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[4] Respondents also suggest that the duplicative punishment problem is insignificant because petitioners "cite not a single case dealing with awards to multiple plaintiffs." Opp. at 7. However, there are numerous examples of courts permitting multiple punitive damage awards to be imposed in the same case to punish the same act or course of conduct. *See, e.g., Robertson Oil Co.* v. *Phillips Petroleum Co.*, 14 F.3d 373 (8th Cir. 1993) (*en banc*), *pet. for cert. pending* (U.S. No. 93-1533); *Glasscock* v. *Armstrong Cork Co.*, 946 F.2d 1085, 1086 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1778 (1992); *General Chemical Corp.* v. *De La Lastra*, 852 S.W.2d 916 (Tex.), *cert. dismissed*, 114 S. Ct. 490 (1993); *Gallant* v. *Prudential Ins. Co.*, No. CV-93-50 (Barbour Country Ala. Cir. Ct. April 6, 1994) (jury verdict imposing $7.5 million in punitive damages against insurance company on vicarious liability theory and $17.5 million against company for failure adequately to supervise insurance agent whose actions were imputed to the company on vicarous liability theory). A jury in New York recently awarded three plaintiffs $18 million each in punitive damages in an asbestos liability case, *Heltzer* v. *Owens-Corning Fiberglass Corp.*, Nos. 4393/89, 113070/93, 113071/93 (N.Y. Sup. Ct.), reportedly because "the number 18 symbolizes life in Hebrew." Lambert, *Jurors Calculate Punitive Damages in Unusual Manner*, Wall St. J., p. B10, col. 1, Apr. 14, 1994.

the statutorily required verdict form, *see* Opp. at 4-7,[5] respondents cannot and do not dispute that petitioners' due process challenge to the Alabama Supreme Court's application of its post-verdict review procedures was properly presented below. At their first opportunity—on rehearing—petitioners expressly argued that the court below "did not perform the . . . review" constitutionally required by this Court's decision in *Haslip*, Pet. App. 43a, and that is all that was required under this Court's practice. *See, e.g., Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 86 n.9 (1979); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930); Pet. at 9.

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[5] Respondents' waiver argument is without merit. *See* Pet. at 7-10. Petitioners explicitly and repeatedly raised their Due Process Clause claims prior to trial, after the verdict, on appeal and rehearing. Indeed, the trial court expressly rejected petitioners' due process arguments on the merits, Pet. App. 62a, and the decision below purporting to invoke a state procedural rule was an obvious and discriminatory attempt to shield this case from federal constitutional scrutiny. Pet. at 9-10. Moreover, petitioners did not, by any stretch of the imagination, "invite" (Opp. at 5) the imposition of five arbitrary, irrational and radically varying punishments for the same act in the same case that bear no relationship whatsoever to the conduct at issue or any harm resulting from that conduct.

Indeed, the verdict form has nothing to do with petitioners' due process attack on the Alabama Supreme Court's application of its post-verdict review procedures and its resulting determination to allow the punishments to stand, even as it materially reduced the compensatory damage awards and found that one respondent, Mrs. McCord, who was awarded $250,000 in punitive damages, suffered *no* injury at all.

CONCLUSION

For the foregoing reasons and those set forth in the petition, this Court should grant certiorari and set this case for plenary consideration.

May 11, 1994

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